# CASES AT LAW

ARGUED AND DETERMINED IN

# THE SUPREME COURT

OF

# NORTH CAROLINA,

AT

# THE TOWN OF MORGANTON.

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## AUGUST TERM, 1847.

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### HENDERSON POTEET *vs.* JAMES H. BRYSON.

Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property, at the time and place specified—otherwise their bond will be forfeited.

Where a covenant is entered into for the delivery of a variety of articles, the condition is broken, if all are not delivered.

The case of *Thompson* v. *Gaylord*, 2 Hay. 150, cited and approved.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

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MEMORANDUM.—By an Act of the General Assembly, passed at the Session of 1846-7, the Judges of the Supreme Court were directed to hold an annual term of the said Court at the Town of Morganton, on the first Monday of August.

JAMES R. DODGE, Esquire, of Surry County, was appointed by the Judges Clerk of the said Court in May 1847.

The Attorney General and the Reporter both attended at this Term.

The plaintiff, as a constable of Cherokee County, levied an execution, which he had in his hands against William Cunningham, upon certain articles, the property of the defendant in the execution, all of which he left in his possession, by virtue of the Act of the General Assembly, passed in the year 1827, *Rev. St. ch.* 45, *sec.* 17, taking from him at the same time a bond for the forthcoming thereof, to answer the execution. The present defendant was an obligor in this bond. The articles mentioned in it were four head of horses, two oxen, a set of harness, and two waggons. The delivery was to be at Murphy on the 5th day of August. Cunningham lived at Murphy. On the day appointed, two of the horses, levied on and included in the bond, were delivered, and sold at public auction, at the Court-house in Murphy, one bringing $27 and the other $10, prices much below their value. Cunningham then declared, that no more of his property should be sold at that rate, and immediately started for his house, Poteet following him. The other two horses were in the stable of Cunningham, and, when he got there, he found Cunningham at the door, armed with a deadly weapon, and who opposed his efforts to enter. While the quarrel was going on between the parties, the defendant said to the plaintiff, "If you will say the word I will bring out the property," and during the altercation he repeated the same words. Poteet made no reply to him at either time. The defendant then observed to him, "there lie the waggons, take notice I deliver them to you," and turned and walked off. The plaintiff immediately after observed to him, "I will hold you bound on your bond." The waggons were in the street, opposite to the stable door of Cunningham, and in the rear of him and the plaintiff; one of them was old and of no value, the other worth $80; of the latter the body was lying on the ground. It was not pretended that either the oxen or the harness were delivered. But it was, on behalf of the defendant, urged, that the waggons were delivered

and the horses in the stable, in consequence of the plaintiff's not saying any thing to the defendant's offer to bring them out; and he further contended, that he was not bound to deliver all the property, as that which was delivered, to-wit, the waggons, was worth $80, a sum more than sufficient to discharge the balance remaining due, after deducting the sum of $37 raised by the sale of the two horses. His Honor instructed the jury, that there was no delivery of the horses in the stable; nor of the waggons, if they inferred that Cunningham was determined to resist the officer, if he attempted to take them, in the same manner he had resisted the taking of the two horses; but that there was a clear breach of the bond in the non-delivery of the oxen and the harness. The jury having found a verdict for the plaintiff, the defendant appealed from the judgment thereon.

*Edney* and *J. W. Woodfin*, for the plaintiff.
*Francis*, for the defendant.

NASH, J. We concur in the opinion of his Honor in the Court below. If there was an error it was one, of which the defendant has no right to complain. It appears to us too plain to admit of a doubt, that neither the horses in the stable nor the waggons were delivered. Cunningham, the defendant in the execution, stood at the door of the stable, armed with a deadly weapon and opposed the entrance of the plaintiff. The latter was going beyond the calls of his duty, in attempting to go into the stable —he had the bond of the defendant to deliver them to him. Nor was it necessary to tell the defendant to go in and bring them out—it was his duty to do so, if he wished to save his bond. The silence of the plaintiff, under the circumstances of the case, when addressed by the defendant, was no discharge of his obligation. Nothing but a positive declaration, on the part of the plaintiff, in answer to the enquiry of the defendant, that he would not re-

ceive them, if brought and tendered, could have that effect. With respect to the waggons, the same remarks apply. When the two horses were sold, Cunningham declared, not that no more of his horses should be sold, but that no more of his property should. This declaration necessarily included the waggons, for they had been levied on and are specified in the bond. His arming himself was, according to his declaration, to protect all the property, subject to the execution, and the waggons were protected by the same force that protected the horses. The question is not, whether the plaintiff would not have been justified in taking them into his possession; but whether the declaration of the defendant, under the circumstances, did amount to a delivery, so as to redeem his bond. To us it appears, as it did to his Honor, who tried the cause, to be a mere mockery so to hold. The delivery, which would save the condition of the defendant's bond, was such an one as would place the property in the quiet and peaceable possession of the plaintiff—not one, which called upon him to fight to get the possession.

But a full answer to the defendant's objection is, that the oxen and harness were not delivered. When a covenant is entered into for the delivery of a variety of articles, the covenant is broken, if all are not delivered. *Thompson* v. *Gaylord*, 2 Hay. 150. The defendant's argument is founded upon the assumption, that the defendant has a right to select what part of the property levied on shall be sold. This is a mistake—it is the privilege of the officer to make the selection. For the time being and for the satisfaction of the execution, he is the owner of the property. A Court of Equity might, under peculiar circumstances, control his discretion in the sale, and, after selling as much as satisfies the process in his hands, he has no right nor authority to sell more, but still he has a right to have the whole delivered. It is unnecessary to pursue these views any farther. We are of opinion

that neither the waggons nor the horses in the stable were delivered, and that there is no error in the judgment of the Court below.

PER CURIAM. Judgment affirmed.

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DOE ON DEMISE OF SAMUEL SMITH vs. ROBERT REAVIS.

Under the *Statutes of Elizabeth*, voluntary conveyances to children, as such, are not absolutely void as to creditors. To make them void, it must be shewn that the maker of the deed was indebted at the time, or so soon afterwards, as to connect the purpose of making the deed with that of contracting the debt and defeating it.

By indebtedness in such a case is not meant a debt of a trifling amount, in comparison to the donor's estate, but he must be "greatly indebted," or at least he must owe some debt, that remains unpaid and will be unpaid, if the conveyance be sustained.

If a father, who conveys land to a son, be indebted at the time, that does not avoid the deed, provided the father pay that debt, or if he retain property sufficient to pay the debt and out of which the creditor can raise the money, when he seizes the land conveyed to the child.

This deed was made before the Act of 1840-1, ch. 28.

The case of *O'Daniel* v *Crawford*, 4 Dev. 197, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Spring Term 1846, his Honor Judge PEARSON presiding.

The premises in dispute belonged to Thomas Reavis in June 1838, and he then conveyed them to his son, Robert Reavis, the defendant, by a deed expressed to be made in consideration of one dollar and of natural love and affection. At the same time, Thomas Reavis made similar deeds for other land, to each of his sixteen other children,

but he retained a tract of land, on which he still lives, and a considerable amount of personal property. In October 1838, Thomas Reavis contracted a debt of $100 to the State, and confessed a judgment therefor, and a *fieri facias* was issued thereon, under which the premises were sold by the Sheriff to the lessor of the plaintiff, in April 1839. On the trial the plaintiff proved, that in April 1838 an indictment was found against Thomas Reavis, which was pending when he made the deeds to his children, and on which he was convicted in April 1839, and fined $150; but it was admitted that he paid the fine and the costs forthwith. The counsel for the plaintiff moved the Court to instruct the jury, that the pendency of the indictment against Thomas Reavis, at the time he conveyed the land to the defendant and his other children, created such an existing demand against him, as made those deeds fraudulent and void in law.—But the Court refused the motion, and directed the jury, that the deed to the defendant was to be regarded as voluntary, and that the indictment, though it did not create a debt, which existed when the defendant's deed was made, was sufficient evidence of a debt in contemplation; and that it was for the jury to consider, whether the deed, under the circumstances, was made with the intent to hinder or delay that contingent or contemplated debt.—A verdict was found for the defendant, and from the judgment the plaintiff appealed.

*Edney* and *Francis*, for the plaintiff.
*N. W. Woodfin*, for the defendant.

Ruffin, C. J. The refusal to give the instructions, asked on the part of the plaintiff, was, we think, correct. The Act of 1840, ch. 28, makes the question of fraud in such a case, one for the jury, under proper advice from the Court. Therefore it was right to decline pronouncing the deed fraudulent, as a matter of law. But, indepen-

dent of that Act, and under any construction of the *St. 13th Eliz.* that has ever prevailed, this deed could not be deemed covinous. As Lord HARDWICKE observed, in *Walker* v. *Burrows*, 1 Atk. 93, there was always a distinction between the two Statutes of the 13th and 27th Elizabeth; and it would be attended with bad consequences, if, as to creditors, voluntary conveyances were, as such, absolutely void, as the Statute extends to goods as well as land, and that construction would defeat every provision for children, though the father were not indebted at the time. Hence, under the *13th Eliz.* it has always been held necessary to shew, that the maker of the deed was indebted at the time, or so soon afterwards as to connect the purpose of making the deed with that of contracting the debt, and defeating it. At least, that has always been the rule, where the deed was not made to a stranger, so as to be purely voluntary, but was made to a child, as a reasonable provision, and thus founded on a meritorious and the "good consideration," mentioned in the Statute. And when the donor's indebtedness at the time is spoken of, it is not intended that the deed is void, if he owed a dollar, or other trifling sum in comparison to his estate; for then no man could make a deed that would stand. But it is meant, that he should be "greatly indebted" as Lord COKE says in *Twyne's* case, 3 Rep. 81, or, at the least, that he should owe some debt, that remains unpaid and will be unpaid, if the conveyance to the child be sustained. *Lush* v. *Wilkinson*, 5 Ves. 384, *O'Daniel* v. *Crawford*, 4 Dev. 197. But, if a father, who conveys to a son, be indebted at the time, that does not avoid the deed, provided the father pay the debt, or if he retain property sufficient to pay the debt, and out of which the creditor can raise the money, when he seizes the land conveyed to the child; for the idea of an intention to defeat the debt is completely repelled; in the one case by the actual payment of it by the father, and, in the other, by the existing and continuing ability

to pay it. It is only when the donor is unable to pay his debts, when he makes a gift, or becoming so, and a debt remains unpaid, that the creditor finds the deed an obstacle to his satisfaction, and has the right to impute fraud to it. Now, in this case, if it be supposed that the fine and costs, that might result from the indictment, constituted a debt, yet that debt was actually paid by the father out of his reserved property, which rebuts the imputation of fraud. So, of the debt for which the land was sold. That was contracted after the deed to the defendant; but, it may be admitted, so soon as to give it, for this purpose, the character of an existing debt. If so, it cannot, nevertheless, affect this deed with covin, because the father kept property much more than sufficient to discharge it, not only when he made the deed, but he had it when he contracted the debt and confessed the judgment, and when his son's land was sold, and, as far as it appears, still has it, amenable to the process of execution.

PER CURIAM. Judgment affirmed.

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THE STATE TO THE USE OF JACOB MERRILL *vs.* JAMES R. McMINN & AL.

Where the only record of the appointment and qualification of a constable was in the following words, to-wit: "James R. McMinn appeared in Court and filed his bond as constable for the County of Henderson for one year and was duly sworn." *Held*, that, under the Act of 1844, curing defects in the official bonds of certain officers therein named, this was sufficient evidence of the appointment of the constable, and of his having qualified and given bond.

The case of *The State v. Pool*, 5 Ired. 105, cited and approved.

Appeal from the Superior Court of Law of Henderson County, at the Spring Term, 1845, his Honor Judge MANLY presiding.

State v. McMinn.

This was an action of debt on the bond of McMinn, one of the defendants, as a constable in the County of Henderson. Plea, *non est factum*. The relator on the trial produced the entry of record made in the County Court, which entry is in the following words, to-wit: "James R. McMinn appeared in Court, and filed his bond as constable for the County of Henderson for one year and was duly sworn." The defendant objected that this entry did not establish his legal appointment as constable. The Court thought otherwise, and a verdict was rendered for the plaintiff, from which the defendant appealed.

*N. W. Woodfin*, for the plaintiff.
*J. W. Woodfin* and *Francis*, for the defendants.

Daniel, J. It is very certain that the objection would have been held good, had it not been for the Act of the General Assembly, at its session of 1844–5, curing defects in the official bonds of certain officers therein named. The circumstance, that the constable's bond was taken by a Court, composed of only three magistrates, makes no difference since the passage of the aforesaid Act of Assembly. *State* v. *Pool*, 5 Ired. 105.

Per Curiam. Judgment affirmed.

D. F. RAMSOUR vs. JESSE RAPER & AL.

A joint judgment was obtained before a Justice of the Peace against A and B. A appealed to the County Court and gave C as the surety for the appeal. At the June Session 1843 of the County Court, judgment was entered against B, and also against C, the surety, both A and B having appeared and pleaded in the County Court. At December Session 1843, on motion the judgment against C was vacated. From this order the plaintiff appealed to the Superior Court. The Superior Court dismissed the appeal on the ground, that there was no error in the judgment of the County Court at its December Session 1843. *Held*, 1st. That the appeal from the Justice took up all the proceedings to the County Court; as, the judgment being joint, one half of it could not be vacated, and the other half left valid in the Magistrate's Court. *Held*, 2ndly. That the County Court had no power to reverse a judgment rendered at a preceding term.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

The facts of this case are stated in the opinion delivered in this Court.

DANIEL, J. Thomas Brown had executed a negotiable bond to Jesse Raper, and he had indorsed it to the plaintiff, who sued by warrant the maker and indorser jointly, and obtained judgment by default against both. On the warrant there is this entry: "The defendant Jesse Raper prays an appeal, on a judgment, obtained against him by default in favor of D. F. Ramsour, to the next County Court, and gives for security James Raper, this 26th day of April, 1843—Teste, E. D. Shields, J. P." The said appeal vacated the judgment, obtained before the Justice, not only as to Jesse Raper, but also as to Thomas Brown, and took up all the proceedings to the County Court. The judgment being joint, one half of it could not be vacated, and the other half left valid in the Magistrate's Court. But, however, both the defendants ap-

peared and pleaded in the County Court. And at the same sessions (June, 1843,) there was a judgment entered against Brown "according to specialty," with a stay of execution also; and, on motion, the Court gave judgment against James Raper, the surety to the appeal. At December Session, 1843, a motion was made to set aside the judgment, which had been entered against the surety for the appeal, at June Session, 1843, on the ground, as he alleged, that there had been no judgment recovered against his principal, Jesse Raper. And the County Court held that the said judgment was erroneous, and granted the motion. The plaintiff appealed to the Superior Court from this order. At Spring Term, 1846, the Superior Court of Cherokee County dismissed the appeal, on the ground, as the Judge said, that there was no error in the judgment of the County Court at its December Session, 1843. From this judgment of the Superior Court, the plaintiff appealed to the Supreme Court. We think that there was error in the judgment of the Superior Court. The County Court, at June Session, 1843, had jurisdiction over the subject matter it then professed to act on. And, although what they then did may have been very erroneous, it was not void; and the same Court, at its December Session following, had no power to reverse the judgment, entered against James Raper at the antecedent June Session, for any error apparent upon the face of the records of these proceedings. The Superior Court was the Court, where the writ of error should have been returned, and errors assigned and then determined on by that Court, before the judgment of the County Court (at June Session, 1843,) could have been reversed, if it was in fact erroneous. We are of opinion, that the judgment of the Superior Court, dismissing the plaintiff's appeal to that Court, was erroneous, and must be reversed. And this must be certified to the Superior Court, and a writ of *procedendo* issued to that Court, to the intent that the said Superior Court may proceed accordingly and may

issue a writ of *procedendo* to the County Court, requiring the said County Court to re-instate the said judgment, rendered at June Term, 1843, and proceed further thereon according to law.

PER CURIAM. Ordered accordingly.

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ROBERT HENRY & AL. vs. LEWIS SMITH & AL.

In an action on a bond for $60, payable to two attornies for attending to a suit, which bond had been due more than twenty years, the defendants relied upon the presumption of payment or satisfaction under the statute, from the lapse of time. To rebut the presumption, the plaintiff proved, that one of the defendants had recently said that he had paid one-half of the bond, and the other half was relinquished, because the attorney to whom it was payable, had neglected to attend to the suit. *Held*, that these declarations were not sufficient to rebut the presumption.

Appeal from the Superior Court of Law of Haywood County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

This suit was commenced on the 3d of April, 1839, by Warrant before a Justice of the Peace. It is debt on a bond for $60, dated April 8th, 1817, and payable immediately to Robert Henry and Joseph Wilson, two attornies, and expressed to be for a fee, for appearing for the obligors in an action of ejectment, then pending. It came on for trial in the Superior Court, upon the pleas of accord and satisfaction, and payment *ad diem* and *post diem*.

Upon the production of the bond, there appeared on it a credit for $30, paid by Smith, April 7th, 1818, to Mr.

Henry, and entered by that gentleman. Mr. Wilson died several years past. To rebut the presumption of payment, the plaintiff offered evidence, that the bond was in the possession of the plaintiff Henry, until the year 1828, and that he then placed it in the hands of one Deaver for collection; and that Deaver then presented it to the defendant, Smith, for payment, and Smith replied "that he considered the debt satisfied: for he had paid Mr. Henry $30 for his part and Mr. Wilson had not been present at the trial of the suit, in which he had been employed, and for that reason he had agreed to give up his part;" that Deaver then presented the bond to the defendant Wikle, and he said, that, soon after the bond was executed, he made an arrangement with Smith, by which Smith undertook to pay the debt, and that he, Wikle, was to have nothing more to do with it and had supposed the money had been paid long ago: That shortly afterwards, Smith and Wikle were together in the presence of Deaver, and Smith admitted the statement Wikle had made to be true, but at the same time repeated what he had himself before said: That Deaver kept the bond from that time, until this suit was brought and mentioned the matter several times to Smith, within ten years before the issuing of the warrant, and Smith always insisted that the bond was satisfied in the manner before mentioned and refused to pay any thing on it.

The defendants then gave in evidence, that in 1835, Smith asked the plaintiff Henry, "did you not agree, when I paid you the $30, to deliver me up the bond to be cancelled?" And Henry replied in the affirmative; but he said further, "that when he spoke to Mr. Wilson, the latter claimed and took one half of the $30 which had been paid, and told him, Henry, to hold on to the bond for $15 due, as he and you had made a new agreement." Whereupon, Smith insisted again, that Wilson had given up his half, as he had neglected the business, in which he had been employed.

The Court was of opinion, that the presumption of payment was not rebutted by the evidence given, and so instructed the jury, who gave a verdict for the defendants and after judgment the plaintiffs appealed.

*Francis*, for the plaintiffs.

*N. W. Woodfin* and *Avery*, for the defendants.

RUFFIN, C. J. We concur in the opinion delivered to the jury. There was a lapse of twenty-two years from the giving of the bond, and of twenty-one from the last recognition of it, as obligatory on the defendants, by the payment then made on it, before the bringing of this suit. There were indeed several applications to the obligors, or one of them, by the plaintiffs' agent for payment, but there is no explanation of the delay to sue, in the insolvency of the obligors or any acknowledgement of the defendants and request for forbearance: but the defendants, on the other hand, directly refused, from the first, to pay any thing more and that distinctly on the ground, that the bond was satisfied upon a new arrangement between the obligees and them. If the facts alleged by Smith were proven, they would constitute a good accord and satisfaction; for undoubtedly a lawyer, who undertakes to appear for a client and fails to do so, is answerable upon his contract to the client, and that will furnish a sufficient consideration for his agreement to cancel or deliver up a security for his fee. But the defendants are not obliged to prove that agreement in aid of the presumption of payment from the lapse of time, more than they would have been, if they, when applied to by Deaver, had alleged any particular mode of payment technically speaking. It certainly does not impair the force of the presumption, that the obligors, when asked for payment, should affirm, that the debt had been paid, or released, or satisfied in any other mode; but this rather strengthens the presumption, inasmuch as

it plainly shews a just reason why the obligees did not sooner demand payment. Here it appears that one of the obligees admitted that he had agreed, twenty years before suit, to deliver up the bond as satisfied, and the defendants uniformly insisted, that the other obligee had been actually satisfied by setting off against his part of the bond his liability for not performing the engagement on his part, for which, the sum mentioned in the bond was to be his remuneration. It is, therefore, a strong case of the concurrence of the legal presumption with actual justice; and the time mentioned in our Statute, ten years, has more than run twice over.

PER CURIAM. Judgment affirmed.

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ANN DONAHO'S ADMINISTRATOR *vs.* JOSHUA WITHERSPOON.

A. had collected a sum of money for B. and, being sued for it by B's administrator, pleaded only the general issue. *Held*, that A. could not give in evidence, that B. had lived with him and that the expenses of her maintenance amounted to more than the money collected. He should have pleaded this as a set off.

Appeal from the Superior Court of Law of Burke County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

The action is assumpsit for money had and received, and the pleas non assumpsit, statute of limitations, accord and satisfaction and release.

On the trial the plaintiff gave evidence, that, about six years before the death of his intestate, Ann Donaho, the defendant, collected from one C. Howard the sum of $300, which he owed to her on his promissory note; and

that the defendant said at the time, that he was collecting the debt for her, who then lived with him and had sundry articles of personal property there. The plaintiff further gave evidence, that, after he administered, he applied to the defendant for the property in his hands belonging to the intestate, and, after receiving the specific chattels, that he asked the defendant, if there was no money or any note for money belonging to her, and he said there was not. Thereupon, the present suit was instituted.

On the part of the defendant, evidence was then given, that, for seven years before the intestate died, she lived with the family of the defendant, on a tract of land belonging to her, the intestate—and that she was so old and infirm, as to be unable to attend to her business; and he offered to prove, that the maintenance of the intestate, during that period, exceeded in value the sum of $300, so received by the defendant. The plaintiff then offered to give evidence to shew, that, admitting the $300 was not sufficient to defray the charges of the intestate, yet the profits or annual value of her plantation, on which the defendant lived, was more than equivalent to that expense. But the Court was of the opinion, that the action was misconceived; for that the facts made a fit case for a bill in the Court of Equity for an account of monies collected, or that the defendant ought to have collected, for the intestate, of the profits of the land—and that in this action, where the defendant showed that the $300 he had received had been expended for board and clothes, the plaintiff could not introduce as a new item, the use of the land as an equivalent. In submission to the opinion, the plaintiff was non-suited and appealed.

*N. W. Woodfin* and *Alexander*, for the plaintiff.
*Gaither* and *Avery*, for the defendant.

Ruffin, C. J. The Court considers the decision erroneous. The defendant did not offer evidence of payments

to the intestate, nor that she and he had come to an account for her board and maintenance, on the one hand, and of the money collected by him, on the other. His defence was simply, that he had a counter demand against the intestate, for seven years board and clothing. That demand is strictly a set off and admissible in no other form—but that was not pleaded. If the defendant had asked leave to add the plea, doubtless the Court would have allowed the plaintiff to add counts for rent or use, and occupation, and for other monies collected, so as to have brought the whole controversy fairly before the jury for adjustment. They were all proper subjects of legal jurisdiction and might have been embraced in this action on either special counts, or the general counts on promises. However, it is needless to speculate on that point, because in the state of the pleadings, this defence was not open at all; and, therefore, without adverting to any other matter, the judgment must be reversed and *venire de novo*.

PER CURIAM. Judgment accordingly.

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JOHN HALL *ex.* JAMES WHITAKER.

Where A. who is an indorser on the note of B. after it becomes due, borrows money from a bank on his own note with surety, and with it discharges B's. note, which also belonged to the bank, *Held*, that A. before paying up his own note in the bank, may maintain an action against B. for money paid to his use.

The case of *Brisendine* v. *Martin*, 1 Ired. 268, cited and approved.

Appeal from the Superior Court of Law of Macon County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

This was an action on the case, brought to recover money, paid by the plaintiff to the use of the defendant.

The plaintiff was an endorser of the defendant's note, discounted at the branch of the bank of the State at Morganton, for the defendant's accommodation. The defendant failing to pay, judgment was taken by the Bank. The plaintiff procured his own note with a surety to be discounted at the same bank, and the proceeds entered to his credit, and by his check he applied the proceeds in payment of the judgment. This latter note was not paid by the plaintiff, until after the commencement of this action. On behalf of the defendant it was contended, that the plaintiff could not maintain this action, until he had paid off his own note at bank. The objection was over-ruled and a verdict for the plaintiff. The defendant appealed.

*Francis*, for the plaintiff.

*N. W. Woodfin*, for the defendant, in support of the objection taken below, cited the case of *Brisendine* v. *Martin*, 1 Ired. 286.

Nash, J. We concur with his Honor, that this is not like the case, where a surety merely procures the creditor to accept his own note in satisfaction of the note of himself and principal. He cannot, in the latter case, maintain the action for money paid to the use of his principal, until he has paid his own note; because, until then, he has not in fact paid any thing—he is out of pocket nothing. But this is a case widely different. The plaintiff did *actually pay* off the judgment against himself and the defendant, with his own *money*, and not with his credit, before commencing his action. The discounting of his note by the bank was an entirely distinct matter, and the money resulting from it was his own, to every purpose, to be applied and used by him as he chose. If he had borrowed the money from any other person,

and with it paid the judgment, it could not be questioned, but that he might maintain his action against his principal, before discharging his own note. If he had conveyed to the plaintiff in the judgment against him and his principal, *property* of any kind, as a negro, horses or bank notes, in discharge of the judgment, and it had been received as such, he might immediately maintain his action for money paid and advanced, *Brisendine* v. *Martin*, 1 Ired. 288, because, in either of the cases enumerated, he would have given that, which was money's worth—he would have been so much out of pocket. It will be perceived, that, in the case cited, bank notes are enumerated, as being a sufficient payment to sustain the action. In this case bank notes were in fact paid by the plaintiff; and whether he drew out of the bank the proceeds of his note in bank notes, and then paid them into the bank again: or, whether, after checking for them, they were by his direction transferred to his credit in discharge of the judgment, can manifestly make no kind of difference. The bank notes were his, to appropriate as he pleased, and, by the appropriation made, he was out of pocket to their amount. We perceive no error in the judgment below.

PER CURIAM. Judgment affirmed.

## THE STATE, TO THE USE OF JAMES S. BISHOP, vs. HENDERSON POTEET & AL.

The interest, which excludes a witness produced in a suit, must be a legal and beneficial interest in the subject matter, for the recovery of which the suit is brought.

It is not sufficient that a witness believes himself interested, if in fact he is not; nor is it sufficient, if he conceives himself bound in morality and honor to make good any loss, sustained by the person, in whose favor his evidence is to be given, in consequence of a judgment against him.

The leaning of the Courts, in modern times, is to let the objection, on the ground of interest, go to the credit, rather than to the competency of the witness. The case of *Cox* v. *Wilson*, 2 Ired. 234, cited and approved.

Appeal from the Superior Court of Law of Cherokee County, at the Fall Term, 1845, his Honor Judge BAILEY presiding.

The defendant, as an officer, received from the plaintiff, through one H. Barnard, certain promissory notes for collection. The action is on his official bond, and the breaches assigned were for collecting and not paying over, and for negligence in not collecting. To sustain the plaintiff's claim, H. Barnard was tendered as a witness; and the sole question presented was, as to his competence. On his examination he stated, that, when he took the notes to hand to the defendant, there was no contract between him and the plaintiff, that he should receive any thing, by way of compensation for his trouble; that he should not ask any compensation, nor was the plaintiff bound to pay any; that if he received any, it would be a mere gratuity on the part of the plaintiff. He was then asked by the defendant's counsel, if a recovery was effected in the case, would he not expect some remuneration from the plaintiff for his trouble. He answered, "yes, he did, he thought it was likely the plaintiff would give him something, but not because he was under any obligation to do so, for what he had done was a mere act of friendship for the plaintiff." In

another part of his examination he stated, that he had before done the same thing for the plaintiff, who had given him some money for his services. The objection was over-ruled by the Court, and there being a verdict and judgment for the plaintiff, the defendants appealed.

*Francis*, and *J. W. Woodfin*, for the plaintiff.
*Edney*, for the defendants.

Nash, J. We think the Judge below was correct in over-ruling the objection. The witness had no such interest, as would disqualify him from giving evidence for the plaintiff. It is the object of Courts of justice to ascertain the truth in every case brought before them. And to this end, such rules have been adopted, with respect to evidence, as are considered best calculated to its attainment; some of them extremely arbitrary, and justifiable only as being a portion of a general system. Among these rules is that, which excludes a witness, without any regard to his moral standing, because of interest. It is not, however, every interest that does exclude a witness. A son has a deep interest in securing, or in adding to, the property of his father; yet he is a competent witness for him, in a suit affecting even his entire property. The law says this interest is too remote. But the instant the father dies, the son is incompetent, because he then is interested directly in increasing or preserving a fund, to a distributive share of which, as next of kin, he is entitled. *Cox* v. *Wilson*, 2 Ire. 234. The interest, then, which does exclude, must be a legal and beneficial one in the subject matter, for the recovery of which the suit is brought; or when he is called to protect or increase a fund, which a recovery in the suit will increase or diminish. The witness, Barnard, stands in no such position here. He expressly states, that, between him and the plaintiff, no contract existed as to compensation of any kind, that his services were those of a friend, and, in law,

according to his testimony, amounted to a voluntary courtesy, for which no action could be maintained. It is said, however, by the defendant's counsel, in argument, that the witness stated, he thought it likely the plaintiff would give him something for his services, and gave his reason for so thinking. He had before performed similar services for the plaintiff, and he had given him money for it; but he went on to state, that, if the plaintiff did give him any thing, "it would not be because he was under an obligation to do so." A more full, direct and positive negation of *all* legal interest in the cause could not be given by a witness. It was at one time thought, and there are *dicta* to that effect, that, when a witness believed himself interested, though in fact he was not, he was rendered incompetent. The contrary doctrine is now fully established. *Cumberland Bank* v. *Hughes*, 17 Wend. 102, 8 Johns. 428. So also, if a witness conceive himself bound in morality or honor to make good any loss, sustained by the person, in whose favor his evidence is to be given, in consequence of a judgment against him, he is still a competent witness. *Gilpin* v. *Vincent*, 9 Johns. 220. *Moore* v. *Hitchcock*, 4 Wend. 297. *2nd vol. Smith's leading cases*, 99. These authorities shew, that the interest, which excludes a witness, must be a direct legal interest—otherwise, the objection is to the credit and not to the competency of the witness. The leaning of the Courts in modern times, I use the expression in reference to the old cases, is to let the objection go to the credit, rather than to the competency, where a doubt may arise. *Walton* v. *Shelly*, 1 Term Rep. 300. *King* v. *Bray*, Rep. in time of Lord Hardwicke, *Bent* v. *Baker*, 3 Term Rep. 27. Here, there is no doubt the witness had no legal interest whatever. It will be observed, that this opinion is confined to the question of the interest that disqualifies a witness, and not to the different modes, by which it may be tested; as whether the verdict can be given in evidence for or against him, or his liability to costs.

We concur with his Honor, who tried the cause, that the witness had no such interest, as excluded him, but that the objection went to his credit.

PER CURIAM. Judgment affirmed.

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THE STATE, ON THE RELATION OF JOHN N. MURRAY, *vs.* WILIE JONES.

Where a sheriff's bond had been taken in 1838, only three justices of the County Court being present, and the bond was only for $4,000 instead of $10,000 as required by law; *Held*, that these defects were cured by the Act of 1844-5, which had a retrospective, as well as a prospective, operation.

The case of the *State* v. *Pool*, 5 Ired. 105, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Special Term, in June 1845, his Honor Judge CALDWELL presiding.

This was a suit on the bond of the defendant, executed in October 1838, as sheriff of Buncombe. It appeared from the record of the County Court, that, when it was taken, there were but three Justices of the Peace on the bench, and the bond appears to be in the penal sum of four thousand dollars, instead of ten thousand, as required by law. The defendant's counsel, moved that the plaintiff be non-suited, on the ground that there were but three justices, who received the bond, and because it did not contain the penalty required by statute. The question was reserved, and the relator, on the breaches assigned, had a verdict. The Court, on consideration, refused to non-suit,

on the ground that the defects were cured by the Act of 1844-5, and on the ground, that, if not cured, the bond was a good bond at common law. Judgment for the plaintiff and appeal by the defendant.

*N. W. Woodfin*, for the plaintiff.
*Francis*, for the defendant.

Nash, J. This suit was commenced in 1842; and, according to the decisions of this Court, theretofore made, the plaintiff could not have maintained his action. In carrying out the will of the Legislature, as expressed in their acts passed at various times, a series of decisions had been made by the Courts; the effects of which were to deprive those, who put business into the hands of public officers, or of those who assumed to act as such, of a large portion of the protection they ought to receive. From year to year, as these evils were brought to their notice, remedies were applied by the Legislature, until, at the Session of 1844-5, an Act passed, which, it was hoped, had remedied and provided for every mischief and defect, which had previously been found to exist. That Act provides "that all persons, who shall be admitted by the County Court and sworn into the office of Sheriff, Coroner or Constable, shall be held and deemed to be rightfully in office, until ousted by due course of law; and that all bonds which have been, or may hereafter be, taken by any Court of Pleas and Quarter Sessions, upon admission of any person into either of the said offices, shall be held and deemed to be valid and effectual to all intents and purposes, notwithstanding any defect, insufficiency or irregularity in the election, appointment or admission of such person, or in any of the proceedings of the Court in relation thereto." At the December Term, 1844, of this Court, the case of *The State at the relation of Jordan & al. against Pool*, was decided, 5 Ire. 105. The action had been commenced prior to

1843, and it was a point of the defence, that the Act of 1844 could not apply to it, so as to alter or change the principles, upon which it was to be determined. There, as here, the records of the County Court did not show, that a majority of the Justices were present, when the bond, on which the action was brought, was accepted. But the Court was of opinion, that, although this was a fatal objection, at the time the action was instituted and the pleas were entered, yet that it was perfectly competent to the Legislature to ratify the delivery, previously made to a third person, of the bond, as it was payable to the State; and that it had done so by the Act of 1844–5. In other words, that the latter Act embraced, as well bonds made before its passage, as those made afterwards. This decision disposes of the first objection made by the defendant.

Another objection has been taken, which is equally untenable. The Act, regulating the election of Sheriffs, requires him, before he enters on the discharge of his official duties, "to enter into bond, with two or more good and sufficient sureties in the penalty of $10,000," &c. *Rev. Stat. ch.* 119, *sec.* 13. In the present case the penalty of the bond is $4,000. Before the Act of 1844–5, this would have been a fatal objection to it, as an official bond. The error, however, is cured by the second clause in the Act referred to. The language is, "and that bonds, which have been, or may be, taken, &c. upon admission of any person into either of the offices, shall be held and deemed valid and effectual to all intents and purposes, notwithstanding any defect, insufficiency or irregularity, &c., or in any other proceedings of the Court in relation thereto." This bond was taken by the Court, on the admission of the defendant, Jones, into the office of Sheriff.

These are the only objections which were taken to the plaintiff's recovery in the Court below, and the only ones, which have been or could be considered here.

We perceive no error in the opinion of the Judge, who tried the cause, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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DOE ON DEM. OF DAVID PARKS *vs.* JAMES MASON.

Where a return of a levy on land by a constable conforms, in its description, to the directions of the Act of Assembly, Rev. St. ch. 62, sec. 16, setting forth among other things that the land lies on a creek, naming it, and it appears that there are several creeks in the county of that name, it is competent for a party to an ejectment suit, brought to recover the land sold under that levy, to shew which creek was intended, when the levy was made.

The case of *Smith* v. *Low*, 2 Ired. 457, cited and approved.

Appeal from the Superior Court of Law of Mecklenburg County, at a Special Term in November 1846, his Honor Judge PEARSON presiding.

The plaintiff claimed the premises, described in the declaration, under a Sheriff's sale, on an execution against the present defendant. The land was levied on by a constable, upon a *fieri facias* issued on a justice's judgment, and he returned the levy in the following words: "For want of goods and chattels, levied this execution on the defendant's land—two tracts—one adjoining the lands of William Lackey and others, and one adjoining the lands of Robert Watson's estate and others, and lying on the waters of Sugar Creek." On the return of the levy to the County Court there was an order made for execution to issue, and a *venditioni exponas* did issue and under it the lessor of the plaintiff became the pur-

chaser of the last mentioned tract, namely, that on Sugar creek.

The sole question, made by the defendant on the trial, was whether the land was sufficiently described in the constable's return. It appeared upon the evidence, that Sugar creek and its branches watered a large portion of the county of Mecklenburg, in which the land is situate: that one of the streams was called "Big Sugar creek," another "Town Sugar creek," and another "Little Sugar creek;" and that they came together in the edge of South Carolina. The plaintiff, then, in order to identify the land, gave evidence, that the late Robert Watson owned a tract of land in the County of Mecklenburg, on the "Town Sugar creek," and did not own any other land in the county, and that the premises now sued for adjoined that tract of Watson's, and was on that branch of Sugar creek, known as "Town Sugar creek," and also that it lay on the main road from Salisbury to Charlotte.

Upon that evidence, the Court held that there was not sufficient certainty in the description of the land in the levy, and non-suited the plaintiff, who thereupon appealed.

*J. H. Wilson*, for the plaintiff.

*Alexander*, for the defendant.

RUFFIN, C. J. The levy is returned, strictly in compliance with the Act of Assembly, which directs, that the constable shall set forth what lands he levied on, where situate, on what water course, and whose land it adjoins, *Rev. St. c. 62, s. 16.* That was done literally in this case; and looking to the return alone, there is no ambiguity in the description, nor any room to doubt, that by it the land could be identified, so that the sheriff could tell what land he was to sell, and bidders also understand what they were buying: which are the objects of the statute in requiring the particularity of description prescribed.

This return must be sustained, for it follows the very words of the Act. The land is situate in Mecklenburg county, lies on Sugar creek, and adjoins the land that belonged to Robert Watson, lately deceased. It is true as was observed in *Smith* v. *Low*, 2 Ired. 458, a levy though returned in the precise words of the Act, may require extrinsic evidence to identify the land, as indeed, may be the case with the most accurate description in a deed. Here, for example, an ambiguity, not appearing on the return, was raised by evidence *dehors* that there were three Sugar creeks in Mecklenburg. But that cannot absolutely avoid the levy and return, which conform to the statute. It only made it necessarry, that evidence should be given, which would connect the return with one of those creeks, and make it appear on which of them the land, according to the description in the return, must lie. This was completely done, by proving that the Watson land, which is called for in the return, lies on a particular branch of the creek, and that Watson had no other land, and that this tract in fact adjoined that one of Watson's. How, better evidence could be given, to show on which of the streams the land lies. or to identify the parcels levied on and sold, it is difficult to conceive.

Per Curiam. Judgment reversed and *venire de novo*.

JOHN WELCH *vs.* WILLIAM W. PIERCY & AL.

The County Court has full power to *order* the laying out of public roads; but none to *lay them out*. The last power is given to a jury.

The Court has the power to decide, whether the public convenience requires the laying out of a road, and to order a jury for the purpose of laying it out; but it has no power, except as to the *termini*, to direct the jury or any one else, *how* it shall run, that being the exclusive province of the jury, their verdict being of course subject to the judgment of the Court, whether it shall be received or not.

An order of the Court directing how a road shall be run and opened does not justify an overseer, who acts under it, and he is liable to an action by the party grieved.

Every man is presumed, in law, to intend any consequence, which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained.

Therefore the defendant was liable, in an action of trespass *quare clausum fregit*, for the loss of hogs, &c. occasioned by the unlawful breaking down of the plaintiff's fence.

The cases of *State* v. *Marble*, 4 Ire. 321, and *Baker* v. *Wilson*, 3 Ire. 170, cited and approved.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

This is an action of trespass *quare clausum fregit*, brought to recover damages, for throwing down the fences of the plaintiff, whereby he lost several hogs and other property. The defendant pleaded in justification, that he was appointed by the County Court of Cherokee County, to open a public road, at the place where the fences were thrown down. He produced in evidence the record of the County Court, whereby it appeared, that, at June Term, 1840, a petition was filed, wherein it is stated "that it will be of great convenience to the neighborhood, that a public road be established, leaving the State road at or near Joel Vannoy's, valley river, passing by Andrew Colvert's, W. W. Piercy's, and to intersect the State Road at or near James King's." At June Term 1840, an order was made

by the Court, directing the Sheriff "to summon a jury to view, mark and lay off a road from Thomas G. Forney's line passing Andrew Calvert's, and William W. Piercy's and intersect the State road at James King's." The jury was duly summoned, and their return is as follows: "The jury met according to the order, and agree that the road be made." They then recommend that the defendant, Piercy, be appointed the overseer, with the hands within certain designated boundaries. The order of the Court, appointing Piercy overseer, is as follows: "Ordered by the Court, that William W. Pearcy be overseer of the road, leading from James King's, down the South side of valley river, crossing the said river at Joel Vannoy's to the Hanks branch, and that he command all the hands on the South side of the said river, a due South course from these points, &c." It then directs the overseer "to work out the same, &c." Acting under this order, the defendant, in opening the road, committed the trespass complained of. It was admitted by the defendant's counsel, that he had failed in proving, that the road had been laid off by the jury, along the place, where the alleged trespass was committed; and he moved the Court to instruct the jury, that, as the road had not been laid off and marked by the jury at any place, the defendant was justified, under his order, in opening out the road, along the nearest and best route between the points mentioned in his order. This instruction was refused, and under the charge of the Judge, a verdict was returned for the plaintiff, in their damages the injury sustained by the loss of the hogs and other articles. From the judgment on this verdict the defendant appealed.

*Francis* and *Edney*, for the plaintiff. 1st. That the County Court had no power to make the order, under which the defendant acted. 2ndly. That one writ lies for several trespasses. *Fitz. Nat. Brev. title Trespass* 106, 198, 201. *Viner* 38, 39, *Co. Rep. pt. page* 173. 3rdly.

Any consequential damages may be laid in aggravation. *Anderson* v. *Brickton*, Strange 192. *Burnett* v. *Alcott*, 2 Term 166 166, *Taylor* v. *Cole*, 3 Term 292, *Bullein N. P.* 82. *Lears* v. *Lyons*, 3 Eng. Cow. L. Rep. 362.

*Gaither*, for the defendant.

NASH, J. The defendant asks for a new trial, because of the refusal of the Judge to instruct the jury as required, and because he charged them, that they might give damages for the loss of the hogs and other property, if they thought it resulted from the pulling down of the fences. We entirely agree with his Honor on both points; and very much for the reasons assigned by him. The County Court of each County is vested with "full power and authority to *order* the laying out of public roads," but none whatever to *to lay them out*. That authority is given to another tribunal, that is, a jury. By the 2nd section of the Act of 1784, *Rev. Stat. ch.* 104, *sec.* 4, it is ordained that "all roads shall be laid out by a jury of freeholders, to the greatest advantage of the inhabitants, and as little as may be to the injury of inclosures." And to secure a faithful discharge of their duty, the jury make their return on oath. The Court, then, have the power to decide whether the public convenience requires the laying out of the road, and to order a jury to be summoned to lay it out; but they have no power, except as to the *termini*, to direct the jury or any one else *how* it shall run, that being the exclusive right of the jury; their verdict being, of course, subject to the judgment of the Court, whether it shall be received or not. It has been urged before us, that, as the defendant was acting under an order of a Court of competent jurisdiction, he could not be a trespasser, as the order was not void but only voidable. If this were the fact, the argument would be sound; but the order is not voidable alone, it is absolutely void, both for uncertainty and want of power in the Court to

make it. It is obvious, from an inspection of the record, that the jury did not lay off any road. They neither marked nor staked it, nor designated in the report the course it should run; and, until they had so done, the Court had no power to order it to be opened, for there is no road to be opened. All that the overseer can do, is to carry into execution the determination of the jury. If the Court direct him to vary from the location made by them or to open a road without their previous action, fixing where it shall run, their order is null and void and does not protect him. To hold that an order, such as was made in this case, would protect the overseer, is at once to place, at the irresponsible discretion of the County Court and of the overseer, the inclosed premises of every individual. The Court would not be answerable, because, if valid, it would be a judicial act, and the officer would be irresponsible, because acting under a warrant from a competent tribunal. But the question has been already partially decided in the case *The State* v. *Marble*, 4 Ire. 321, and in that of *Baker* v. *Wilson*, 3 Ire. 170. In the latter, the plaintiff was appointed an overseer of a road, that had no existence, in law or in fact, and the action was brought, to recover from the defendant, one of the hands assigned to the plaintiff, the penalty for not working on it. On behalf of the plaintiff it was contended, that the order was a judicial determination that there was such a road. The Court decided that it was not; that so to hold, would be to repeal the Act of the Legislature on the subject. In this case, the road, ordered by the Court to be opened by the overseer, had no existence in law or in fact. If, instead of suing the defendant for a trespass, the plaintiff had put up his fences again, could an indictment have been maintained against him for obstructing a public road? Surely not, for the plaintiff was the owner of the land. If it could, the singular spectacle would have been exhibited, of two antagonistic rights, existing in different persons at the same time—the right

of the overseer to throw down the fences, and the right of the owner to put them up. This cannot be so. If the order justified the overseer, then he had in law a right to do what he did, and it would have been criminal in the plaintiff to have opposed or prevented him, or to have obstructed the road after it was opened. But, again, if the County Court had the power to make the order, it was the duty of the overseer to obey it, and, if he did not, he would be punishable by indictment, but the case of *Baker* v. *Wilson*, decides that he could not be punished. The instruction prayed for could not have been given, without a manifest and palpable violation of the Act of Assembly. It is admitted, that if the jury had laid out a road, the defendant had departed from it, in pulling down the fences, and his justification is claimed under the order, on the plea that he had chosen the best and most convenient ground, on which to run it between the points designated by the Court. This defence substitutes the overseer for the jury, and transfers from the latter to the former a discretion, which the law no where authorizes. It violates one of the most important provisions of the road law, the protection which it throws around the property of every citizen. It never was the will of the Legislature, that any man's property should be taken, for the use of the public, without compensation. And the law we are considering so said, and appointed a tribunal to assess the damage each individual may sustain by running the road on his land—not the Court nor the overseer—but a jury of his country. This case remarkably exemplies the danger of departing from the provisions of the Act. Two individuals, on whose land the jury intended the road should run, are allowed trifling compensation, for the injury was small; while the present plaintiff, through whose valuable low grounds and inclosures the overseer has chosen to run it for a quarter of a mile, is allowed nothing.

Upon the return of the jury, it was the duty of the County Court to have set aside their verdict, because they had not performed the duty assigned them, and to have ordered another jury to go upon the ground. They had no right nor power to substitute themselves or the defendant in the place of a jury.

We entirely concur with his Honor, that the County Court had no power to make the order they did, nor had they the power to authorize any man to cut out a road at his discretion; and that the defendant was not justified by it in pulling down the fences of the plaintiff.

We agree with the Court below on the question of damages. Every man, in law, is presumed to intend any consequence, which naturally flows from an unlawful act, and is answerable to private individuals for any injury, so sustained. The authorities cited at the bar, so far as we had it in our power to examine them, sustain the proposition. The question was very correctly left to the jury, to say whether the loss of the hogs and other property was the consequence of the pulling down of the fences, and they said that it was.

PER CURIAM. Judgment affirmed.

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MICHAEL JONES *vs.* WILLIAM B. MORRIS, Ex'r. &c.

Where the defendant, in consideration of a debt he owed, agreed to let the plaintiff have a bed and furniture of the value of $28, but no particular bed and furniture were conveyed or delivered, and afterwards the defendant refused to deliver any bed and furniture, *Held*, that the action of trover would not lie for the plaintiff.

Appeal from the Superior Court of Law of McDowell County, at the Spring Term, 1847, his Honor Judge DICK presiding.

This was trover for a bed and furniture, tried on not guilty. The case was, that Morris was found to be indebted to Jones, on a settlement, in the sum of $60; and they agreed that the former should give the latter his note for $32, (which he did,) and also should give him a bed and furniture at the price of $28, being the residue of the debt, when Jones should apply for it at the house of Morris. Shortly afterwards, Jones went there for the purpose of getting the bed and furniture, and met Morris at the gate going from the house, who requested plaintiff to go to the house, saying he would be back soon. The plaintiff went in but was ordered out by Mrs. Morris, and went away without seeing Morris, and then brought this suit. The Court expressed the opinion, that the plaintiff could not recover, because he made no demand on Morris for the bed and furniture, and also because he failed to prove a conversion, and in submission thereto the plaintiff suffered a non suit and appealed.

*Guion*, for the plaintiff.
*Edney*, for the defendant.

RUFFIN, C. J. A demand was really immaterial, for if it had been made and refused, it would not have entitled the plaintiff to recover in this form. His case fails, because he has not shewn a property in any bed and furniture, which could be converted to his prejudice. The agreement between the parties was merely executory, obliging Morris to convey and deliver to the plaintiff some bed and furniture of the value of $28, and not amounting to a conveyance or delivery of any bed and furniture in particular, so as to vest the title in the plaintiff. The action was therefore misconceived and cannot be sustained.

PER CURIAM. Judgment affirmed.

## WILLIAM GUDGER *vs.* JOHN R. FLETCHER.

The plaintiff sold to the defendant some cattle for $50. He received from the defendant a promissory note for thirty dollars payable the 1st of January, ensuing—and a bank note for twenty dollars, which was to be returned, if found not to be good, and the defendant was to have credit until the 1st of January. The bank note was returned as also the due bill, which was destroyed by the defendant, who then offered to pay ten dollars and give his note with surety for $40, payable the 1st of the next January. The plaintiff refused to accept them. *Held*, that the plaintiff could not sue the defendant in a *quantum valebat* until after the 1st of January.

A due bill, though written with a pencil and not in ink, if legible, is good.

Appeal from the Superior Court of Law of Henderson County, at a Special Term in June 1846, his Honor Judge BAILEY presiding.

This was an action of assumpsit on *quantum valebat*, for cattle sold and delivered to the defendant. Plea, the general issue. The plaintiff introduced a witness, who testified, that the defendant stated to him, that he had bought the plaintiff's cattle for the sum of fifty dollars, and that, in payment therefor he gave his due bill for thirty dollars, on which the plaintiff agreed to wait until the 1st of January following, and the balance he paid in a bank note, which the plaintiff at first hesitated to accept; upon which he told him, that if it were not good, or did not answer his purpose, he would take it back and give him another—that, sometime afterwards he met the plaintiff, who told him the bank note was worthless and handed it back, and also handed back the due bill, which had been written with a pencil, and which, on that account, the plaintiff alleged was not good—that the defendant then offered to give the plaintiff ten dollars and secure the balance of the debt, which was disagreed to by the plaintiff, and nothing further was done. Another witness for the plaintiff testified, that he was present when the plaintiff returned the bank note, and he gave

substantially the same account of what then happened between the parties, as had been stated by the defendant to the first witness, adding only that when the due bill was handed back, the defendant tore it up.

The defendant then introduced a witness, who testified, that the sale of the cattle was made upon the following conditions: First, that the defendant was to give his due bill, payable to the plaintiff the 1st of January thereafter, with the witness as surety, which he did and the same was accepted by the plaintiff; Secondly, that the defendant was to pay twenty dollars, which he then had, and, if it did not answer the purposes of the plaintiff, he was to return it to the defendant, and wait till the 1st of January for the said sum.

The Court instructed the jury, that, according to the original terms of the contract, if they had been complied with by the defendant, the plaintiff could not have recovered in this case, because he had commenced his action before the 1st day of January, upon a *quantum valebat;* but that, if the jury believed the account given by the witnesses, of what took place between the parties, upon the offer of the plaintiff to return the bank note, the special contract was done away with, and the plaintiff then had the right to sue immediately and declare upon a *quantum valebat.* The plaintiff had a verdict and judgment, and the defendant appealed.

*N. W. Woodfin* and *Edney*, for the plaintiff.

*Baxter*, for the defendant, cited *Thompson* v. *Morris*, 2 Murph. 248, and the authorities there cited.

Daniel, J. The Court told the jury, that what took place between the parties, upon the offer of the plaintiff to return the bank note, caused the special contract to be done away with, and the plaintiff had the right to sue immediately on the count for a *quantum valebat.* It does not seem to us, that the plaintiff had a right to sue before

the first of January following. The due bill for thirty dollars, although written in pencil, if legible, was good. The law does not require a note or bond to be written in ink: it is done generally, as the most convenient mode and the most likely to perpetuate the contract. *Story on Bills, p.* 33, 34, 53. The bank bill was to be taken back if the plaintiff did not like it, and the defendant was then to have time until the first of January following, to pay that sum also. The defendant, however, on the return of the bank bill, and the surrender to him of his note for thirty dollars, offered to give his note with surety for $40, payable the 1st of January following, and ten dollars in cash. This offer was rejected by the plaintiff. It seems to us, that the defendant tendered performance of the contract on his part, and that the plaintiff, because he refused to accept the defendant's note with surety for forty dollars, and the ten dollars in cash, had not a right immediately to sue on a *quantum valebat*. The defendant was entitled to time to pay the $50, until the first of January following, to-wit, 1845.

The judgment must be reversed, and a new trial granted.

PER CURIAM. Judgment reversed and new trial.

THE STATE TO THE USE OF WILLIAM M. DULA vs. WILLIAM LAWS & AL.

Where, in a suit pending in the County Court, an award by referees under a rule of Court is made in favor of the plaintiff, and the Court sets aside the award and orders a trial, upon which there is a verdict for the defendant, the plaintiff cannot, by then appealing, bring the questions on the award before the Superior Court. He should, as he had a right to do, have appealed from the decision of the County Court upon the award.

The case of *Harvey* v. *Smith*, 1 Dev. and Bat. 189, cited and approved.

Appeal from the Superior Court of Law of Wilkes County, at the Spring Term, 1847, his Honor Judge SETTLE presiding.

The writ in this case was returned to August Term, 1839, of Wilkes County Court. At February Term, 1844, the case was referred, by a rule of Court, to L. Q. Sharp and his award was returned to April Term, 1844. On the motion of the defendant the award was set aside at the same term, and the cause was ordered to stand for trial. At May Term 1846, the issues were tried on the pleas of the general issue, covenants performed, no breach; and a verdict was rendered for the defendant. An appeal was taken to the Superior Court, and, on motion of the plaintiff's counsel, judgment was by the Court rendered according to the award in the County Court. From this judgment the defendant appealed.

*Iredell*, for the plaintiff.

No counsel for the defendant.

NASH, J. In the opinion of his Honor, there is error. The judgment of the County Court upon the award was final, in form at least, upon that point, and it materially affected the subject matter in dispute. The defendant,

against whose interest the judgment operated, had a right to appeal to the Superior Court, that a review of the error of the County Court might be had, if there was any. He failed to do so, and the cause went on to be tried before a jury; and, upon a verdict and judgment against him, he appealed to the Superior Court. We are of opinion that the appeal did not take up the judgment of the County Court upon the award. The objections to *that judgment* were waived by the plaintiff, because he did not bring them forward in proper time, as he might have done by an appeal. Upon the appeal as taken, the award was not before the appellate Court, and the cause ought to have proceeded, as it did in the County Court. The case of *Harvey* v. *Smith*, 1 Dev. & Bat. 189, recognizes the rule and establishes an exception to it. That was a case of a petition for the re-probate of a will. In the County Court the prayer for re-probate was granted, and issues were made up to try the validity of the will. These were submitted to a jury, who returned a verdict, and an appeal was taken to the Superior Court, where, upon motion, the proceedings were dismissed by the presiding Judge for error in the judgment for a re-probate of the will. The Supreme Court, after recognizing the rule herein stated, proceeds, "But, *nevertheless*, we are of opinion, that where, upon a petition for a re-probate, and the same has been ordered and an appeal taken by either party from the ultimate sentence upon such a re-probate, *that* appeal places the entire cause in the revising Court." And the reason given is, that the petition must be considered, as containing the allegations of those propounding the paper, and the ultimate judgment must be founded on those allegations, as admitted or proved. "If *they* will not authorize a sentence for the party propounding, the Court is obliged to refuse to him such a sentence." The decision in that case rests upon the peculiar nature of the proceedings, which distinguish it from the present. But if the award had been before the Court, the judg-

ment affirming it was erroneous. Upon its face it was not final.

PER CURIAM. Judgment reversed and a writ of *procedendo* awarded.

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THE STATE, TO THE USE OF N. S. JARRATT, *vs.* THOMAS McGEE & AL.

The receipt of a deputy sheriff, for a claim put in his hands for collection, is evidence against the sheriff in an action for failing to collect the claim.

And as such a receipt binds the sheriff, it is, under the Act of 1844, competent evidence against his sureties as well as himself.

The cases of the *State* v. *Allen*, 5 Ired. 36, and *State* v. *Fullenwider*, 4 Ired. 364, cited and approved.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term, 1847, his Honor Judge DICK presiding.

This is an action of debt, on the sheriff's bond, against him and his sureties, and was tried on the plea of conditions performed. The breach assigned was, the failure to collect a justice's judgment, which the relator placed in the hands of one of the sheriff's deputies for collection. In support of his case, the relator offered in evidence the receipt of the deputy to the relator for the judgment, "to collect or return," and the counsel for the sureties objected, that it was not competent evidence against them; but the Court admitted it and there was a verdict for the plaintiff. From the judgment the defendants appealed.

*Gaither*, for the plaintiff.
*J. W. Woodfin*, for the defendants.

RUFFIN, C. J. There is no doubt upon this question of evidence. The Act of 1836, *Rev. Stat.* c. 109, *s.* 23, makes the sheriff and his sureties liable for claims placed in the hands of a deputy. The receipt of the depnty for the claim is evidence against the sheriff, when given in the discharge of official duties; and this is a receipt of that kind. *State* v. *Allen*, 5 Ired. 36. Indeed, the receipt of the deputy, being the act of an agent, is, in law, the receipt of the sheriff himself, and binds him accordingly —as if the deputy receive the money on an execution and give an acquittance therefor, or return satisfaction on the execution in the sheriff's name. It is true, that in *Fullenwider's case*, 4 Ired. 364, it was held, that a constable's receipt for a claim to collect was not evidence against the sureties. But, probably on account of that case, that has been altered by the Act of 1844, which makes the receipt or acknowledgment of the sheriff, or any other officer, or any other matter or thing, which is admissible against him, competent also against his sureties. The Act is remedial, and this is the receipt of the sheriff, within the meaning of the Act; and, at all events, it is an instrument, which is competent evidence against the sheriff, and it is, therefore, admissible against all the defendants.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF MARY B. KESLER vs. RICHARD W. LONG & AL.

A Sheriff and his sureties in his official bond are not bound for the collection of any claim put in his hands for collection, unless, as in the case of constables, the claim be within the jurisdiction of a Justice of the Peace.

Appeal from the Superior Court of Rowan County, at the Spring Term, 1847, his Honor Judge SETTLE presiding.

The case was as follows. Long, one of the defendants, while Sheriff of Rowan County, gave his receipt to the relator for a note against one Cowen, for $250, "to bring suit on." This action is against Long and his sureties in his official bond, and the breach assigned is, the receipt of the money by Long and his failure to pay it over to the relator. Pleas, *non est factum*, conditions performed and no breach. The plaintiff proved that the defendant, Long, had received the money. The Court, being of opinion, upon the question reserved, that the plaintiff could not recover in this action, a non-suit was entered and the plaintiff appealed.

No counsel for the plaintiff.
*Boyden* and *Iredell*, for the defendants.

DANIEL, J. A Sheriff, who receives claims for collection, shall diligently endeavor to collect and pay them over, in *like manner* as constables are now bound; and in default of such duty, he and his sureties are liable for damages by suit on his official bond. *Rev. Stat. ch.* 109, *sec.* 23. This Act was originally enacted in the year 1836. The Sheriff, as well as a constable, could and often did, before the passage of this Act, serve warrants, and return them before magistrates, and execute any judicial process, issuing from a magistrate's Court, if it was directed to him as Sheriff. It was, in many parts of

the State, very common for the holders of claims to put them in the hands of the Sheriff or his deputy, for collection. And we suppose that the Legislature passed the above Act, to place the Sheriff and his sureties upon the same footing, on which a constable and his sureties were then placed, as to claims put in his hands. If claims were of an amount above the jurisdiction of a magistrate, they usually were placed in the hands of an attorney, to be sued on in a Court of Record; if less, they usually were placed in the hands of a constable, who then became agent for the plaintiff, in having the warrant issued, and the judgment and execution obtained; and then he officially acted as constable, in enforcing the execution and collecting the money. The Sheriff, by the Act, is bound to collect and pay over claims, "in like manner as constables are now bound." How are they bound? The law requires a constable to collect, or diligently endeavor to collect, all claims put in his hands for collection, and pay over all sums, thereon received, either with or without suit. If the claim could not be collected without suit, the constable was to sue upon it. Where? The answer seems plain, that he is to sue in the magistrate's Court, whose ministerial officer the constable is. The claims mentioned in the Act, then, must be such as are within the jurisdiction of a Justice of the Peace, or are brought within his jurisdiction by judgments obtained before him. This being the proper construction of the aforesaid Statutes, as it seems to us, we think that the claim of $250, placed by the relator in the hands of Long, was not a claim, within the meaning of the Act, to subject him and his sureties. The claim was one, that should have been sued on in a Court of Record, and should more properly have been placed in the hands of an attorney at law, or an attorney in fact, for collection. We think that the judgment must be affirmed.

Per Curiam. Judgment affirmed.

THE STATE TO THE USE OF JAVAN TRAMMELL vs. ROBERT THOMAS & OTHERS.

Where a judge told the jury in his charge, that they must find for one of the parties, unless they believed his witness had committed perjury, the charge was erroneous, because the credit of the witness was a matter for the jury, not for the Court, and the witness might have been mistaken, and not guilty of perjury.

Appeal from the Superior Court of Law of Henderson County, at a Special Term, in June 1846, his Honor Judge BATTLE presiding.

This was an action of debt upon the bond of the defendant, Thomas, as Sheriff of Henderson County, in which the breaches assigned were, that one Clayton had, as the deputy of Thomas, failed to collect a claim against one Hunter, which he had in his hands and might, by due diligence, have collected, and for failing to make a due return of a *ca. sa.* which he had taken against the said Hunter. Pleas, conditions performed and not broken. Upon the trial the plaintiff had made a *prima facie* case. The defendants, after a release by Thomas to his deputy, introduced him as a witness. He testified distinctly and positively, and repeated it upon his cross-examination, that, when the plaintiff placed the claim against Hunter in his hands for collection, which was in the year 1842, he told him he looked upon it as a doubtful claim, and he wished him to do what he could, to collect or at least to secure it; that thereupon, he, the witness, after being unable to find any property of Hunter, upon which he could levy a *fi. fa.* at the instance of the plaintiff, sued out a *ca. sa.* and under it arrested the defendant therein, Hunter, who gave bond with security to appear at the succeeding term of the County Court, and take the benefit of the Act for the relief of insolvent debtors; that he, the

witness, had the papers at that term and would have returned them, had not the plaintiff requested him to keep them until he could endeavor to arrange the debt with Hunter, and that, on the second or third day of the term, the plaintiff applied to him and took the *ca. sa.* and other papers from his hands, and had never returned them to him. He stated that this took place in the presence of several persons, and that the defendant in the execution, Hunter, was, as he believed, present. Hunter was then asked, if he was present and saw the papers returned to the plaintiff, and he stated that he had no recollection of the transaction, and, moreover, that he had remained at Court all the week, awaiting the return of the *ca. sa.* into Court.

The Court instructed the jury, that the plaintiff was entitled to recover, unless they believed the witness, Clayton, but that the testimony of that witness, if believed, formed a complete defence to the action: that the statement of Clayton was such, as precluded the idea of a mistake; and, if it were false, it must be within his own knowledge; and that the jury must believe he had committed perjury, before they could find a verdict for the plaintiff; and the charge was closed with directions to the jury, about the duty of reconciling testimony, &c.

The jury returned a verdict for the defendants, and the plaintiff's counsel moved for a new trial, upon the sole ground, that the Court had instructed the jury, that they must believe that Clayton had committed perjury, before they could find a verdict for the plaintiff. That motion was over-ruled, and, judgment being rendered for the defendants, the plaintiff appealed.

*Baxter* and *Francis*, for the plaintiff.
*N. W. Woodfin* and *J. W. Woodfin*, for the defendants.

Daniel, J. The plaintiff moved for a new trial, because the Judge charged the jury, that the witness, Clay-

ton, could not be mistaken in his testimony, and that they must believe he had committed perjury, before they could find a verdict for the plaintiff. We think that the charge was erroneous. The credit, which is to be given to the testimony of a witness, is not a matter of law for the Court to decide upon, but a matter of fact, to be ascertained by a jury, without the assistance of the Court. That Clayton might have been mistaken in what he stated, was within the range of possibility; whereas, to make him guilty of perjury, he must have sworn to material facts in the cause, which he knew at the time to be false. The Judge did not permit the jury to inquire, whether Clayton was innocently mistaken in his testimony; but he took it upon himself to pronounce, that the jury must believe him, unless they were of opinion, that he was perjured, that is, that he had sworn falsely, knowingly, wilfully, and corruptly. We think that his Honor went a little farther in his charge, than the law authorized.

PER CURIAM. Judgment reversed and new trial awarded.

## H. B. WILLIAMS *vs.* ALEXANDER SPRINGS & AL.

In an action of debt on a covenant, proof of the hand-writing of the obligors, together with possession by the obligee, is evidence from which the jury may presume a delivery, in the absence of proof to the contrary.

The circumstance of there being three seals affixed, without any names before them, is not sufficient to rebut the presumption of delivery, or to shew that those who did sign did not intend, that the covenant should not be delivered, until the other persons signed it.

A covenant was executed by B. and C. reciting that whereas A. had loaned to D. $1,600 and D. was desirous of securing the same, they, B. and C. bound themselves to A. that if D. did not pay the debt before the 30th day of February, 1844, they would pay it at the time stipulated and waive notice. This is not a mere guaranty, but an absolute promise to pay the money, if D. did not pay it at the time stipulated, and no notice was necessary.

The cases of *Vanhook* v. *Barnett*, 4 Dev. 268, *Blume v. Bowman*, 2 Ired. 338, and *Gardner* v. *King*, 2 Ired. 300, cited and approved.

Appeal from the Superior Court of Law of Mecklenburg County, at a Special Term in November 1846, his Honor Judge PEARSON presiding.

This action is brought on the following covenant: "Whereas H. B. Williams hath this day advanced for W. J. Alexander and Nat. W. Alexander the sum of sixteen hundred dollars, and whereas the said Alexanders are desirous of securing the said Williams in the payment of the same: Now we, the undersigned, in the event the said Alexanders should fail well and truly to pay the said Williams the sum aforesaid on the 30th day of February, A. D. 1844, do for value received hereby covenant promise and agree to and with the said Williams to pay the same—and we hereby agree, in the event the said Alexanders should fail to pay the same at the time stipulated, to waive notice thereof. Given under our hands and seals, August 30th, 1843." The covenant was signed and sealed by the defendants and M. Hoke, and there are three other seals without any names before them. There

was no witness to the deed, and no other evidence of its delivery, than its being in possession of the plaintiff and produced by him on the trial. The plaintiff offered in evidence a single bill under seal, executed by W. J. Alexander and N. W. Alexander, for the sum of $1602 37, payable to the plaintiff six months after date, and dated August 1843, but on what day does not appear. The reading of this bond was objected to by the defendants but admitted by the Court. The action was brought on the 5th of August, 1844. The covenant was admitted in evidence upon proof of the hand-writing of the defendants. The defendants alleged that the covenant was to have been signed by three other solvent persons, before it was to be their deed, but gave no evidence to that effect. The recovery was opposed upon three grounds; 1st. that there was no sufficient proof of the execution of the covenant; 2ndly. that there was no evidence, that the sum guaranteed by the covenant had not been paid by the Messrs. Alexander; 3rdly. that the bond should not have been admitted, and, without it, there was no evidence, that the sum stated in the covenant was advanced by the plaintiff to the Messrs. Alexander. W. J. Alexander was produced as a witness, and, on his examination, stated, that he borrowed the money from the plaintiff and agreed to give the guaranty of the defendants with W. Hoke. The objections were all over-ruled and a verdict rendered for the plaintiff. From the judgment thereon, the defendants appealed.

*J. H. Wilson*, for the plaintiff.
*Boyden* and *Iredell*, for the defendants.

Nash, J. We concur with his Honor in the Court below, and for the reasons he assigns. Proof of the hand-writing of the defendants, together with possession by the plaintiff, was evidence, from which a jury might presume a delivery by the defendants in the absence of any proof

to the contrary. *Vanhook* v. *Barnet*, 4 Dev. 268, *Blume* v. *Bowman*, 2 Ire. 338. The latter case sustains the opinion of his Honor, that the circumstance of the three seals affixed, without any names before them, was not sufficient to rebut that presumption, or to shew that the defendants did not intend, that the covenant should not be delivered, until other persons signed it. In that case not only were there three vacant seals, but the name of another obligor in the bond, who did not sign it. The *second* objection is founded upon the idea, that the covenant was a guaranty, on the part of the defendants, of the repayment of the money borrowed by the Messrs. Alexander. Such may have been the intention of the parties, but such certainly is not the effect of the deed. It is, on their part, an obligation to pay to the plaintiff the money mentioned in it, if on the 30th of February, 1844, the Messrs. Alexander did not pay it. This condition is inserted for their benefit, and is to be proved affirmatively by them. To enable the plaintiff to recover in this action, it was not necessary for him to have made a demand on the Messrs. Alexander, or to prove that they had not paid. The obligation of the defendants to pay became complete, upon the expiration of the time, within which they, the Alexanders, were to make payment and their failure to do it. *Gardner* v. *King*, 2 Ire. 300. The introduction of the bond, given by the Messrs. Alexander, was entirely harmless and of no effect. If it was intended by the plaintiff as evidence to prove the sum borrowed, the recital in the covenant was sufficient, and the bond was, therefore, irrelevant. If any error was committed by suffering its introduction, it was entirely redeemed by the instructions given to the jury, as to their measure of damages, if they found for the plaintiff. We concur with his Honor on all the points ruled by him.

Per Curiam. Judgment affirmed.

THE STATE ON THE RELATION OF TURNER CULBERSON *vs.* SILAS MORGAN.

An execution upon a dormant judgment is not void. It is only irregular; and that is an objection, which can only be taken by the defendant in the execution—and not by the officer to whom it is directed, who is bound to serve it.

It is the duty of an officer to sell property levied on, in a way to bring the best price, unless the parties interested consent that the sale may be made in a different way.

The case of *Dawson* v. *Shepherd*, 4 Dev. 497, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at a Special Term in June 1845, his Honor Judge CALDWELL presiding.

This action is debt on the official bond of the defendant, as a constable, and the breach is a false return of *nulla bona* on a *fieri facias*, issued by a Justice of the Peace on a judgment in favor of the relator against one Sharp. Plea, conditions performed. On the trial the relator gave evidence, that, after he delivered his execution to the defendant, the latter sold a waggon and team, consisting of five mules, and their gear, in mass, for the sum of $138; which was less than their value, and that he did not apply any part thereof to the relator's satisfaction. The defendant then showed, that the judgment had been rendered a little more than a year before the execution issued; and thereupon his counsel insisted, that he was not bound to act on the execution. But the Court held, that the defendant was bound diligently to serve it. The defendant then further gave evidence, that, when he received the execution in favor of the relator, he had seized the waggon, gear, and team, (amongst other things,) on executions in favor of other creditors of Sharp; and that by the agreement of some of those creditors, who were present at the sale, he offered that property in mass, and

it brought the sum before mentioned, which was applicable to the prior executions. The Court thereupon told the jury, that the sale was unlawful, as it was the duty of the officer to sell the property in a way to bring the best price, unless the relator consented to a sale in that manner. The jury found against the defendant, and after judgment he appealed.

*Francis*, for the plaintiff.
*J. W. Woodfin*, for the defendant.

RUFFIN, C. J. An execution upon a dormant judgment is not void. It is only irregular; and that is an objection to be taken by the defendant in the execution. It does not lie with the sheriff to raise it. The process justifies him, and therefore he is obliged to serve it. The case of *Dawson* v. *Shepperd*, 4 Dev. 497, is in point.

The duty of the officer, as to the mode of sale, was correctly stated to the jury, as the counsel for the defendant admits. But he insists, that the Judge erred in undertaking to assume, as a fact, that the articles sold for less, when put up together, than they would, if offered separately. The Court would concur readily in that position, if that point of fact had been disputed on the trial, and the Judge had undertaken to decide it, instead of submitting it as an enquiry for the jury. But it is obvious, that was not the case. The very low price, being but little, if any, more than the value of a good waggon, prevented the defendant from contending before the jury, that more would not have been got, if more competition had been admitted by putting up the articles separately. Therefore, instead of doing that, he took another position: which was, that some of the creditors selected that mode of sale, and that was sufficient for his justification. So it was, as to those creditors who directed it. But it was not, as to those creditors who were absent, and who suffered prejudice by that manner of selling; and of the

latter class was the relator. But, plainly, that defence yielded, that a different mode of selling might or would have brought a better price, especially as the defendant gave no evidence to the contrary, nor insisted thereon in argument. Although it would have been erroneous not to have left that point to the jury, if it had been asked, or if the defence had not imported, that the defendant did not dispute the matter of fact; yet it is not error in the Judge to have assumed as true, what the defence itself, thus either expressly yielded, or was what plainly to be inferred from it. The objection was not taken at the trial and fairly presented to the Court, but is a mere after-thought and catch at the Judge's words, taken abstractly and without reference to the state of the case in which he used them, and as such it cannot be sustained. As no question was made upon the amount of damages, we take it for granted, they were assessed upon the principle of allowing the relator what he would have received, if the sale had been properly conducted, and after satisfying the prior executions: for he was entitled to no more.

PER CURIAM. Judgment affirmed.

## SPENCER RICE *vs.* ROBERT PONDER.

In an action for a malicious prosecution, it is sufficient, in order to prove the prosecution terminated, to shew that the plaintiff was bound to appear at a term of a Court to answer a criminal charge, that he did appear and was not rebound. Much more is it so, when the Solicitor for the State makes an entry on the docket, that he does not think the evidence sufficient to convict.

It is not a sufficient defence to an action for a malicious prosecution, that the defendant really believed the plaintiff guilty of the crime, with which he charged him, but he must prove facts and circumstances, which would induce a reasonable suspicion of the guilt in the minds of unprejudiced and, at least, ordinarily intelligent persons.

The case of *Murray* v. *Lackey*, 2 Mur. 369, cited and approved.

Appeal from the Superior Court of Law of Yancy County, at September Term, 1845, his Honor Judge BAILEY presiding.

The action is for a malicious prosecution for a larceny and was tried on not guilty pleaded.

The plaintiff gave in evidence a State's Warrant issued against him and two other persons, upon the application of Ponder, for stealing certain hogs belonging to Ponder, in Yancy County, on which the plaintiff was arrested, and, after examination before a Magistrate, was bound over to the County Court, at February term 1842, to answer the charge. At that term the defendant appeared, but no indictment was preferred against him, nor was he further bound over; but an entry was made on the docket, "that the Solicitor, on examining the witnesses, was of opinion, that the charge could not be sustained: the defendants, or two of them, at least, living in Tennessee and the taking not proved to have occurred in Yancy County." The plaintiff then called several witnesses, further to support the issue on his part, who deposed as follows: One Lamras stated, that he was the son-in-law of the defendant, Ponder, and that being in the house of

the plaintiff in Tennessee, a few miles from the State line, the plaintiff proposed to sell to him some fat hogs, then in a pen near the house: And that he went to the pen, to look at the hogs and immediately discovered that two of them were in the mark of Ponder, and therefore he asked the plaintiff how he came by them, and the latter replied that he purchased one of them from Balis Moore, and the other from David Metcalf, who had purchased it from said Moore, and that Moore had bought both of them from one William Rice, a brother of the plaintiff. This witness further deposed, that on the same day, he made inquiry of Balis Moore respecting the hogs, and was informed by Moore, that they, with others in the same mark—which the witness then saw—had been purchased by him from William Rice, and that the plaintiff had afterwards purchased the two, in the manner in which the plaintiff had before stated. And this witness further deposed, that he informed the defendant, Ponder, of all these facts, in some short time and before he instituted the prosecution.

The said Balis Moore and David Metcalf also deposed, that Moore had purchased the hogs, with others, from William Rice, and that they were sold by them, respectively, to the plaintiff, as above represented; and that they so told Ponder, before he took out the warrant.

The said William Rice also deposed, that he had formerly lived in this State, but that, several years past, he had moved over the Tennessee line and lived near the plaintiff's, and about ten miles from Ponder's and across the mountains from him—that after getting to Tennessee, he purchased a brood sow, which had a litter of pigs in the winter, all of which were frozen to death but two, and the ears of those were frost bitten so badly, that when he went to mark them, he found he could not put them into the ear-mark, which he had formerly used in this State—and he then marked them, by cropping both ears and slitting the left. He further deposed, that the sow had a

second litter some months afterwards, which he put into the same mark, and that, afterwards, being about to remove back to this State, he sold all the stock of hogs, when the pigs were small, to Balis Moore. He further deposed, that shortly after Ponder had heard that hogs in his mark were in the plaintiff's pen, he enquired of the witness whether he had so marked them and sold them to the plaintiff or Moore; and that he, the witness, had then forgotten, that he had marked them in this particular mark, and therefore, informed Ponder, that he had not thus marked them and offered to make oath thereof—but that, at the same time, he further informed the defendant, that he remembered the flesh marks of the pigs that he had in Tennessee, and that he had sold to said Moore. The witness further deposed, that soon afterwards and before the defendant took out the State's Warrant, they went together to the plaintiff's to see the hogs, and there found them in the pen; that he, the witness, then recognized the hogs by their flesh marks, as those which he had sold Moore, and so declared to the defendant Ponder, but that still, he did not recollect having marked them, until the plaintiff, in the presence of the defendant, reminded him of the circumstances, under which the two litters of pigs had been marked, as before stated by him, and that then, he did at once remember the same and immediately informed the defendant that he remembered it, and stated all the particulars to him, as above set forth. Some days after that transaction, the defendant took out the State's Warrant and had the plaintiff arrested.

To maintain the issue on his part, the defendant produced his son, John Ponder, who deposed that he knew his father's stock of hogs and saw the two hogs in the plaintiff's pen, and he believed them to belong to his father, and that they had been missing two falls: And he stated also, that the plaintiff denied having a knowledge of his brother William's stock mark. The defendant also gave in evidence, that, on the trial of the warrant,

he was examined as a witness for the State and then deposed, that from the ear-marks and the flesh-marks, found in the plaintiff's pen, he believed them to be his property and that he also believed that they had been stolen out of the range, in North Carolina. The defendant further gave in evidence, that, on the next day after William Rice had stated to him, at the plaintiff's house, that he remembered marking the hogs, the said William denied that he had marked the hogs, and said "he would not swear to it, to save all their lives." The said William, however, stated, at the same time, that the hogs, found in the pen of the plaintiff, were the same hogs, he had sold to Balis Moore. And the defendant gave further in evidence, that Balis Moore attempted, after his purchase, to alter the ear-mark, but that finding he could not change it into his own mark, he desisted: And that this also was made known to the defendant, when he was at the plaintiff's.

Upon that evidence, the counsel for the defendant insisted before the jury, that the plaintiff was guilty of the larceny charged on him; and if the jury should find otherwise, then he insisted, secondly, that the evidence showed, that he had a reasonable and probable cause, for having the plaintiff prosecuted therefor: and he prayed the Court so to instruct the jury. The Court refused to give the instruction as prayed; but, after informing the jury, that, to support the action, it was necessary the plaintiff should shew that the defendant instituted the prosecution maliciously and without probable cause, the presiding Judge gave his opinion to the jury, that, if all the facts, as given in evidence were true, there was not any just or probable ground of suspicion, that the plaintiff had stolen the hogs of the defendant, and that there was not therefore probable cause for the prosecution. Thereupon the Court instructed the jury, that, if they should believe, that the defendant was actuated by malice towards the plaintiff, in causing him to be prose-

cuted for the theft of the hogs, they ought to find for the plaintiff, and assess such damages as they might deem right. The counsel for the defendant also moved the Court to instruct the jury, that the plaintiff could not recover, because he had not shown that the prosecution had been finally determined. But the presiding Judge refused to give such instructions. The jury found for the plaintiff and he had judgment, and the defendant appealed.

*Francis* and *Baxter*, for the plaintiff.
*N. W. Woodfin*, for the defendant.

Ruffin, C. J. Upon the last point, the case of *Murray v. Lackey*, 2 Mur. 369, is a direct authority for the plaintiff. He was not only not rebound, and thus stood discharged, according to that case; but it is clear, from the memorandum of the State's Attorney on the docket, that the proceeding was intended and considered to be at an end.

Upon the question of probable cause, the evidence produces, on the minds of the members of this Court, the same impression that it did on that of his Honor in the Superior Court. As the case stands, it is to be admitted, that the defendant and his son and son-in-law, and it may be others, believed that the hogs of the defendant had been stolen, and that those in the plaintiff's pen were the same or some of them. But with that admission, there was not sufficient evidence that the plaintiff probably stole them. The only circumstance against him is, that hogs, which the defendant thought to be his, were in his possession. That is evidence, that may be very cogent, or the contrary, according to other circumstances. Where a theft is recent, the possession of the stolen goods, not accounted for, is strong evidence, when, from the nature of the goods, it is probable if the party came honestly by them, he could shew it. But it is a sufficient answer to

the suspicion arising from the possession, if the party does show, that he got them by purchase or in any other fair way. And even in such a case of recent theft, if the person, upon whom the goods are found, does not conceal them, but, as here, keeps them near his house, open to observation, and, upon their being challenged as another man's, tells at once, how, when and from whom he received them, and, at the instance of the claimant produces the very persons, from whom he said they came, and they confirm his representation in all its particulars and exonerate him from all charge, and make themselves responsible for his possession; no intelligent and impartial mind could harbour a suspicion, that, however it might be with others, he had stolen the goods though they were in his possession. If indeed this were a fair reason for thinking, that the persons, thus assuming the responsibility, did so falsely in collusion with the possessor, for the mere purpose of screening him, that would make a difference. But such a supposition is not readily credited and is not admissible but upon good proof; and in this case there was no request on the part of the defendant, to leave an enquiry of that kind to the jury. In truth, however, the present case is far less strong than that supposed. The defendant's own evidence is, that his hogs were turned into the range in the mountains, fifteen, or perhaps, eighteen months before they were seen by the son in-law, at the plaintiff's; which was the distance of ten miles from the defendant's, with two mountains between. From those facts simply and the identity of the marks of these hogs with that of the plaintiff, it would be a rash presumption and harsh inference that the plaintiff had gone across the mountains and stolen those hogs—at all events, without asking him how he got them, and assuming every thing in its worst form.

No jury would, we think, pronounce a man guilty under these circumstances. But here enquiries were made of the plaintiff, and he promptly gave answers and explana-

tions, which, if true, perfectly excupated him, and then he proceeded to make it appear, that what he declared was true, by producing two men, who acknowlged, that they had sold the hogs to him, with the marks they then had, and that, without altering the marks, he had kept them openly and had claimed them notoriously, for a year or more. Surely after that, every possible suspicion of theft by the plaintiff vanishes. It would be impossible for any man, on whom a stolen article may, at any distance of time, be found, to establish his innocence of the theft, by proof of an honest purchase, if the evidence here, if believed, were not convincing, that the plaintiff was not guilty of either taking the hogs, or of receiving them feloniously. Then let it be taken for granted, that the defendant believed the hogs to be his; and still that will not affect the plaintiff's right to recover. The defendant must know, that he, like other men, is liable to be mistaken, and also that others may have the same mark, that he has; and upon the information he had, it was but a just and ordinary diffidence of his own infallibility, to allow, that he might be and was mistaken and that these were not his hogs. But if he were ever so confident upon that point, yet he could not believe—at least, not rationally—that the plaintiff had stolen them, when others assured him, that they had sold them to the plaintiff and he had not only kept them exposed to the view of all comers, but when he actually took a member of the defendant's own family to look at the hogs, upon a proposal to sell them to him, marked as they were, and when, from that time to the end of the investigation, the plaintiff gave the same account of the manner of his coming by them, and was fully sustained therein by the persons referred to by him. It is true, that one of those persons, William Rice, on being applied to by the defendant, at first said, he did not mark the pigs he sold; but even then he said, he did sell some pigs to Moore, among which were the two the plaintiff afterwards purchased and that he should

know them, if he could see them: Accordingly the defendant took the witness with him, to examine them; and as soon as he saw them in the plaintiff's pen, he declared them to be the same which he had sold, when young, to Moore; and upon the circumstances, under which he had marked his pigs, being re-called to his mind, by the plaintiff, in the presence of the defendant, he declared that he then remembered that also. All these statements came fully to the knowledge of the defendant, before he began the prosecution; and it does not appear, that he had the least reason to doubt, or disbelieve, that the plaintiff did purchase the hogs from Moore and Metcalf honestly and thinking that they had a right to them. If those witnesses were to be believed, the defendant had no ground for a lingering suspicion of the plaintiff's integrity in the transaction, but was obliged then to think him, as the jury has since, upon the same evidence, found him to be, not guilty.

PER CURIAM. Judgment affirmed.

J. J. McELRATH & AL. *vs.* THOMAS BUTLER.

Where a judgment was rendered in October 1838 by a magistrate, upon a return of the constable on the warrant "executed," but not having the name of the constable signed to the return; *Held*, that this judgment was not *void*, for the want of the signature of the constable to the return on the warrant.

And, *held further*, that the defendant in that judgment, against whom a magistrate, at a subsequent time, had rendered judgment upon the former judgment, could not be relieved from the last judgment by writ of *recordari*, without first having the prior judgment reversed.

Appeal from the Superior Court of Law of Burke County, at the Spring Term, 1847, his Honor Judge DICK presiding.

The defendant, Butler, issued a warrant against Hugh McElrath and several others, in a plea of debt for the sum of One Hundred Dollars, due by note; and the constable returned the warrant, "executed," but did not sign his name thereto, and afterwards he died. On the 15th of October, 1838, R. C. Pearson, a Justice of the Peace, entered judgment against the said Hugh for $100 principal, interest and costs. On the 4th day of September, 1843, Butler issued another warrant against Hugh McElrath, in a plea of debt due by former judgment, in the sum of $100. This warrant was executed and a judgdered on it, by Thomas Walton, a Justice of the Peace. Hugh McElrath obtained a writ of *recordari* to issue to Walton to record the proceedings had before him, and send them into the Superior Court of Burke County: which was done accordingly. The ground of the motion for the *recordari* was, that the first warrant, on which Pearson gave a judgment against him, had never been executed on him, nor had he any notice of the same. The Judge, on the hearing in the Superior Court, ordered that the judgments, heretofore given by R. C. Pearson

and Thomas Walton, Esquires, be vacated. From this order, the defendant, Butler, appealed to the Supreme Court.

No counsel for the plaintiffs.
*Avery*, for the defendant.

DANIEL, J. It seems to us that the Judge erred in reversing the first judgment, given against Hugh McElrath by R. C. Pearson; for there was no petition nor prayer by Hugh McElrath, that it should be vacated. It was not before the Court. *Secondly.* Hugh McElreath insisted, that the judgment rendered against him by Walton was erroneous, because he, Walton, had rendered it on the former judgment, which Hugh alleged was *void*, as having been rendered against him without notice. The Judge, we think, erred in reversing this judgment. The warrant, on which the first judgment was rendered against Hugh McElrath, was returned executed on him by the constable, but the constable neglected to sign his name to his return. We do not think that the judgment rendered by Pearson was *void*. If it was erroneous, until it was reversed for error, it was good evidence, for Walton to render the second judgment on. We think that the judgment of the Superior Court must be reversed, and judgment on the *recordari* entered for the original plaintiff, Butler.

PER CURIAM. Judgment accordingly.

JOHN PARKER vs. PENIL GILREATH.

A seal is not required to be affixed to an attachment or warrant issued by a Justice in a civil case.

Where a defendant in an attachment is brought before a Magistrate, not by a levy on his property, but by summoning a garnishee, no advertisement or notice in writing is required.

Appeal from the Superior Court of Law of Henderson County, at a Special Term, in June 1846, his Honor Judge BATTLE presiding.

This was a writ of false judgment, brought to reverse a judgment obtained before a Justice of the Peace by the present defendant against the present plaintiff, who had been summoned as a garnishee in an attachment at the instance of the defendant against one Leonard Cagle. The errors assigned are set forth in the opinion delivered in this Court. The Judge below reversed the judgment and the defendant appealed.

No counsel for the plaintiff.

*Baxter* and *N. W. Woodfin*, for the defendant, cited *Duffy* v. *Everitt*, 5 Ired. 455, *Clark* v. *Quinn*, 5 Ired. 175, *Washington* v. *Saunders*, 2 Dev. 343, 2 Chit. Black. p. 141, note 3, 1 Chitty's Pr. 774, 775.

DANIEL, J. This was a writ of false judgment to the Superior Court of Henderson. The plaintiff assigned several errors; and the defendant replied, that in nothing assigned was there any error. The Court adjudged, that the judgment, which had been rendered by the Justice against the garnishee, Parker, should be reversed. The Judge does not inform us, on which of the errors assigned he reversed the judgment of the Justice. We must therefore examine the whole record and see if his Honor's judgment was right. The *first* error assigned is, that

there was no seal to the attachment or to the judgment. We know of no law, that requires a Justice of the Peace to seal an attachment or warrant in a civil cause or his judgment thereon, and the practice has always been not to seal them. The *second* error assigned was, that there was no conditional nor final judgment against the defendant in the attachment; and therefore none could, in law, have been rightfully entered against Parker, the garnishee. We have examined the proceedings returned into the Superior Court, and see that there were both a conditional, and (after thirty days) a final, judgment rendered against the defendant in the attachment for $98. There is therefore no error here. *Thirdly*, that there was no notice to the defendant in the attachment, nor advertisement in writing. We, think, that, on attachments of this kind, advertisement in writing is not necessary. The Act *(Rev. Stat. ch. 6, sec. 19,)* gives attachment against debtors residing abroad and also those who conceal themselves, and requires the Justice to direct advertisment for thirty days, when the officer levies the attachment on the goods and chattels, lands and tenements of any person or persons *residing out of the county*, in which such attachment is issued. This attachment recited that L. Cagle (the defendant in it) "had absconded, or so conceals himself, that the ordinary process of law cannot be served on him." The constable did not levy the attachment on any goods or lands of Cagle; he was brought into the magistrate's Court by summoning a garnishee. The words "had absconded" in the attachment, do not shew that Cagle resided out of the county. The justice's omitting to make advertisement for thirty days, in this case, was not error. *Fourth*, error assigned, "no judgment against garnishee, for reason, not within thirty days or without with notice." We cannot make sense of this. If it is intended to be assigned for error, that no judgment had been rendered against the garnishee, we must say it is not true, for such judgment was rendered for $94, on the day the

garnishment was given in to the justice. *Fifth* error, "Transferred by defendant in attachment, before notice of the attachment." If we are to understand by this assignment of error, that the debt, due by the garnishee to the defendant in the attachment, was *bona fide* transferred by the defendant to another person and paid by the garnishee to that person, before he had notice of the attachment, we must say that there is nothing in the proceedings to shew that averment to be true. On the contrary the garnishee stated in his garnishment, that he owed that debt to Cagle. If it were true, he should have brought such a defence to the notice of the justice, in his garnishment, that Gilreath might have denied the fact, if he thought proper, and taken issue on it. This course was not taken by the garnishee, and it cannot now be heard. It is no good cause to reverse the judgment rendered against the garnishee. *Sixth* error assigned, "The attachment was not returnable at any certain time or place." We see that the officer was directed in the attachment to return it before the justice, who issued it, or some other justice of the county, within thirty days, Sundays excepted. This was agreeably to the Act of Assembly; and if the defendant had appeared, and offered to replevy, then the officer would, as in other warrants served, have given him notice of the time and place of trial.

We cannot see any legal ground, upon which the Superior Court could have reversed the judgment, which the magistrate gave in favor of Gilreath against Parker, the garnishee. We think, that the judgment of the Superior Court must be reversed, and that of the Justice affirmed.

PER CURIAM. Judgment accordingly.

## JOSEPH RINEHEARDT vs. FELTON W. POTTS.

Where, in speaking of a trial before a magistrate, in which the plaintiff had been a witness, the defendant said that "he (the plaintiff) had sworn falsely," these words import that the plaintiff had committed perjury and are, in themselves, actionable.

This Court cannot act upon affidavits offered in the Court below. It is the province of that Court exclusively to determine the facts, and the Supreme Court can only review so much of the judgment, as involves matters of law, strictly.

Appeal from the Superior Court of Law of Macon County, at the Fall Term, 1844, his Honor Judge BATTLE presiding.

This was an action on the case for slander. The words charged in the declaration and proved were, that the defendant, in speaking of the testimony given by the plaintiff, on the trial of a warrant before a magistrate against the defendant and two others, Davidson and Enloe, in which they were charged with a forcible trespass in taking a horse, said "he had sworn falsely." The defendant relied upon the plea of justification, and introduced testimony, tending to establish the truth of the charge, which was met by testimony on the part of the plaintiff, tending to prove, that the evidence, which he gave before the magistrate, was true. It appeared on the investigation of the charge against the defendants for the forcible trespass, that the defendant, Potts, was an officer and as such had levied an execution on a horse, as the property of one Wikle, and taken him into possession and delivered him to Davidson to keep; that he was secretly taken from Davidson's stable and was afterwards found in the stable of the plaintiff's father, with a chain locked round his neck and fastened to one of the logs of the stable; that Potts, Davidson and Enloe went there to get him, but were forbidden by the plaintiff's mother to take him;

and that Davidson and Enloe, notwithstanding such prohibition, prized up the logs of the stable and took him out, the plaintiff and his mother both being present and objecting to it. The plaintiff swore, that Potts assisted in getting the horse from the stable, and in that it was that the defendant, Potts, said he committed the perjury. In his argument to the jury, the defendant's counsel contended, that neither Potts, Davidson nor Enloe had committed any forcible trespass, for that in law they were justified in taking the horse in the manner they did, but no point of law was raised to the Court, that the plaintiff could not have committed perjury on the trial of the warrant, and that therefore the words were not actionable. So far from it, the whole argument of the counsel was addressed to the jury, insisting that the evidence sustained the plea of justification. The jury returned a verdict for the plaintiff. The defendant moved to set it aside, upon an affidavit, the substance of which was, that, in making up their verdict, each juror put down what he thought should be the amount of damages, that these several sums were added up, and the aggregate was divided by twelve and the quotient determined upon as the verdict. The Court refused the motion. The defendant then moved for a new trial, because the Court had not told the jury, that the words were not actionable; but the Court held, that, as the objection had not been taken before, it could not be raised for the first time on a motion for a new trial. The motion was accordingly refused and judgment given for the plaintiff, from which the defendant appealed.

*N. W. Woodfin* and *Edney*, for the plaintiff.
*Francis*, for the defendant.

Daniel, J. In a *colloquium* relative to a trial before a magistrate of a State's warrant against the defendant and two others, when and where the defendant had been

sworn and examined as a witness, the defendant said "That Rineheardt (the plaintiff) had sworn falsely." These words were, in law, to have that sense and meaning placed upon them by the Court and jury, that the bystanders affixed to them. The hearers of the said words spoken could not, from the subject matter of the conversation, understand the defendant to mean any thing else, than that the plaintiff had committed perjury, in his evidence on that trial. The words, spoken under the circumstances they were, were actionable of themselves, for they, in effect, charged the plaintiff with having committed wilful and corrupt perjury.

*Secondly:* The defendant offered the affidavit of Dowdle, to shew to the Court, that the jury had misbehaved themselves in the manner of making up their verdict; and, on this affidavit, he moved that the verdict should be set aside and a new trial granted. The case sent up here only states, "that the Court refused the motion." We do not know upon what grounds the Judge refused the said motion; it may have been because he did not believe Dowdle. The defendant did not pray the Court to give the reason for rejecting the motion; and, as we cannot see that it was in fact over-ruled *against law*, we cannot say that there was any error in the judgment of the Judge upon this part of the case. We have often stated, that this Court cannot act upon affidavits offered in the Court below. It is the province of that Court exclusively to determine the facts, and we can only review so much of the judgment, as involves matters of law, strictly. We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

## THE COMMISSIONERS OF THE TOWN OF ASHEVILLE *vs.* JAMES B. MEANS.

The commissioners of an incorporated town have no right to impose any taxes, but such as are expressly authorized by the Act of incorporation.

A power to enact bye-laws, &c. for the good government of the town, of *itself*, confers no right to levy taxes.

Appeal from the Superior Court of Law of Buncombe County, at the Special Term in June 1846, his Honor Judge BATTLE presiding.

This was an action, commenced by a warrant before a single magistrate, to recover the sum of twenty-five dollars, which the Board of Commissioners for the town of Asheville had imposed, as a tax upon the defendant as a retailer of ardent spirits. It was admitted, that the defendant resided and did business, as a retailer, within the limits of the town; and the plaintiffs contended that they were authorized to impose and collect the tax sued for, by virtue of the Act of 1840, ch. 58, entitled "An Act to incorporate the town of Asheville in the County of Buncombe and to appoint Commissioners thereof." The defendant insisted, that the Act referred to did not confer the power upon the plaintiffs to impose the tax sued for, and of this opinion was the Court. Upon the intimation of this opinion, the plaintiffs submitted to a judgment of non-suit and appealed.

*N. W. Woodfin* and *Edney*, for the plaintiffs.
*Gaither*, for the defendant.

DANIEL, J. The Judge was of opinion, that the Act of Assembly mentioned in the case, did not confer the power on the commissioners, to lay the tax on the defendant, for the non-payment of which he was sued. The third section of the Act empowers the commissioners of Asheville

to lay a tax, annually, on the property and *inhabitants* of the said town, not exceeding ten cents on each hundred dollars valuation of real estate in the said town, and ten cents on every taxable poll, as they shall deem necessary for the repair of the streets and for the good of the said corporation. It seems that the Legislature has expressly conferred on the commissioners the power of taxing but two objects, to-wit: the real estate, and polls within the limits of the town. The Legislature, designating two objects of taxation, intended, as it seems to us, to exclude from the taxing power of the commissioners every thing else. It would have been very imprudent legislation, to have permitted the commissioners to tax any and every thing in the town they might think fit, and that, without limit in the amount of the tax. The powers conferred on them, to pass bye-laws for the good government of the town, does not authorize them to make bye-laws to lay taxes on any other things than those expressly named by the Legislature. We think that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

LEVI McDANIEL vs. PHILIP W. EDWARDS.

An action by a father for the seduction of his daughter will not lie, when the daughter is of full age, and not living in her father's family, but in the actual employment of another person, though her father was to receive part of her wages.

The case of *Phippe* v. *Garland*, 3 Dev. & Bat. 44, cited and approved.

Appeal from the Superior Court of Law of Haywood County, at the Spring Term, 1847, his Honor Judge DICK presiding.

This was an action on the case for the seduction of the plaintiff's servant and daughter, Mary. Plea, not guilty.

The plaintiff introduced the daughter as a witness, and she stated, that she always lived with her father and labored as one of the family, until she went to live with the defendant, as herein after stated; that in the month of February, 1844, her father hired her to the defendant, at fifty cents a week, to manage his household affairs, during the expected confinement of his wife; and that she then went to the defendant's and remained there until October following, when she returned to her father's in a state of pregnancy from cohabitation with the defendant during the month of May of that year and while she was living with the defendant. She further stated, that she has lived ever since with her father and labored in the family, and that she was there delivered of the child, of which she was pregnant by the defendant, in the month of May 1845. She further stated, that she was uncertain, whether she was 21 years of age in September, 1843, or became of that age in September, 1844; and that she received from the defendant part of her wages, while she lived with him, and her father received part.

On the part of the defendant, evidence was given, that the daughter herself made the contract for services with the defendant, and that she was of full age two or three years before she made it or went to his house.

The Court instructed the jury, that, if the daughter was an infant, when the seduction occurred, they ought to find for the plaintiff; and, also, that, if they believed she was of full age, when she went to live with the defendant and was seduced by him, yet if the plaintiff had made the contract, under which the daughter went into the defendant's service, and received the wages to his own use, then and in that case they ought to find for the plaintiff.

The jury gave a verdict against the defendant, and from the judgment he appealed.

*Edney* and *J. W. Woodfin*, for the plaintiff, cited the following authorities, 3 *Blac.* 141 *note*—1 *Wend.* 447. *Briggs* v. *Evans*, 5 Ire. 16. 2 Term Rep. 167. 6 East 387. 5th East 45, 47.

*Francis*, for the defendant, cited the following authorities, Steph. N. P. 3 vol. 235, and cases there referred to. 3 Dev. & Bat. 44. *Postlewait* v. *Parks*, 3 Bur. 1878. *Bennett* v. *Alcot*, 2 Term Rep. 166.

Ruffin, C. J. Actions of this kind have been frequent in modern times, and we have looked into most of the reported cases; but we have been unable to find one, that bears out the latter branch of the rule laid down to the jury in this case. Since the case of *Postlewait* v. *Parks*, Bur. Rep. 1978, it has been perfectly understood, that the gist of the action is the relation of master and servant and the loss of service. Therefore, though very slight service is sufficient to establish that relation, *de facto*, between father and daughter, yet it is indispensable to shew some service, in order to have that effect. Where the daughter is living with the father, whether within age or of full age, she is deemed to be his servant, for the purposes of this action; in the former case, absolutely, and in the latter, if she render the smallest assistance in the family, as pouring out tea, milking, or the like. So also, if the daughter be within age, the action may be

maintained by the father, to whom she returned to lie in, although she was on a visit to or living with another person at the time of the seduction, *Harper* v. *Luffkin*, 7 B. & C. 387, unless the daughter had not the *animus revertendi*, in which case she could not by any fiction be considered in the father's service. *Deen* v. *Peel*, 5 East. 45. The reason, why the father may have the action for seducing his infant daughter, though not living in his family, is, that she is, both legally and actually, *sub potestate patris*. But that shews, that the action will not lie, when the daughter is of full age, and not living in the father's family, but in the actual employment of another person. There is no case, that gives any color for the supposition, that it would lie under those circumstances, except that of *Johnson* v. *McAdams*, stated in the argument of counsel in *Deen* v. *Peel*. But that was the decision of a single Judge at *Nisi Prius*, and the daughter went from her father's on a short visit, merely, to a lady, and not on a contract of hiring, and, moreover was under age when she went away, though she obtained full age before the seduction. Even in that case Mr. Justice WILSON hesitated very much; saying at first, that "where the daughter was of full age and no part of the father's family, he thought the action *not* maintainable." It is true he aftewards told the jury, that the consent of the father to the daughter's visit was to be inferred from the circumstances, and, therefore, that she might be considered as a part of the family. But the case was never carried before the Court in Bank, and, when cited by counsel, did not receive any expression of approbation. If, however, that case was right, it has no application to the present, as here the daughter was living with another person, and was his actual servant upon a contract of hiring: which comes within the rule, laid down by Judge WILSON himself, above quoted. That rule was adopted by this Court in the case of *Phipps* v. *Garland*, 3 Dev. and Bat. 44. There, it was expressly stated, that the daughter, who

was of full age, went to live with Garland, with her father's consent, and her *animus revertendi* was clear, as she left her property at her father's, and she frequently returned there on visits, and on such occasions washed and cooked; yet it was held, that she could not constructively be considered the father's servant, and, therefore, that the action did not lie. The reason, why the action does not lie in that case, is, that the father has no legal right to the service of the daughter, nor authority over her, and she is not, *de facto*, a servant in his employment, but stands in that relation to another. Therefore, the circumstance, that the father and this defendant made the bargain for the daughter's service and wages, can make no difference. For, although that might be the form the transaction assumed, yet, in law, the contract was that of the daughter, as she was *sui juris*. We do not say how it might be, if there had been an actual contract between the father and daughter for her service to him for a definite period, and, within the term, the father, by her consent, hired her to the defendant and he seduced her. But if the father could have the action in that case, it would be by force of the express contract between him and the daughter for her time and labor; and that could not authorize this action, where there was no such contract and no ground for implying it. The defendant did not become entitled to the services of this young woman in virtue of any contract of the father; for she was *sui juris*, although he may be called her master while she remains in his family, and he cannot, upon mere implication, be allowed the authority, as master, to hire her out, so as to make it obligatory upon her, and thereby continue the relation of master and servant between them. In law, the contract, on which she served the defendant, was her own and the wages were hers. The fiction of service has been carried far enough in actions of this kind, without pushing it to this extreme length; which, if admitted, would break down the rule itself, that the

action is found on loss of service. For, next, it would be said, if the parent aided in the support of the daughter, as by giving her a garment or nursing her in sickness, that she might be considered as continuing to be his servant, though of age and living in service abroad, and thus, it would come at last, that the action was that of a father and not a master, and present the extraordinary instance, mentioned by Lord MANSFIELD, in *Satterthwaite v. Dewhurst*, 5 East, 46, note, of an action by a person, on account merely of incontinence between two others, both of whom are of full age.

PER CURIAM. Judgment reversed and *venire de novo*.

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DAVID PARKS *vs.* THOMAS N. ALEXANDER & AL.

A sheriff has no right to return *nulla bona* on an execution, without making an effort to find property at the residence of the defendant in the execution, or making any demand of payment or enquiry for property.

A mere general report that the debtor has no property will not justify such a return, if the debtor in fact has property, subject to be levied on.

Appeal from the Superior Court of Law of Mecklenburg County, at a Special Term in November 1846, his Honor Judge PEARSON presiding.

This was an action of debt upon the defendants sheriff's bond for the year 1840. The breach assigned was a failure to collect a debt due by one Johnson, which had been placed in his hands for collection.

The plaintiff proved, that, in May 1840, he placed in the defendant's hands, for collection, a note due by the said Johnson for about $30. The plaintiff called one McGilvery, who swore, that, during the summer and fall of 1840, and until some time in 1841, Johnson had in his possession, using and claiming as his own, a Carryall and Buggy, worth over $50; and that in 1841 the Carryall and Buggy were sold by a constable to satisfy another debt of Johnson's. The defendant called several witnesses, who swore, that, in 1838, Johnson was sold out, and from that time until his death in 1842 was reputed and considered to be insolvent. Johnson, as well as the plaintiff and defendant, all lived in the town of Charlotte. None of these witnesses had ever been to the house of Johnson to make enquiry after property. Johnson was an intemperate man, a Saddler and Harness-maker by trade, and worked in a shop owned by one Houston, and was generally supposed to have no property and to be entirely insolvent. The defendant's counsel insisted, that when a man was generally reputed to be insolvent, an officer could not be made liable for failing to collect a debt, unless the plaintiff shewed him property, or proved that the officer knew that the debtor had property. The Court refused so to instruct the jury, but told them, that, if they believed the testimony of the witness, McGilvery, the defendant had not used due diligence and was liable in damages to the plaintiff for his neglect; that where a debtor had property in his possession, it was the duty of the officer to make enquiry, notwithstanding a general report as to the debtor's insolvency, and, if it turned out that the debtor was in fact the owner of property liable to execution, it was no excuse for the officer, and he had no right to say, that it was the plaintiff's business to make the inquiry and inform him of the fact.

The jury found a verdict in favor of the plaintiff. A rule for a new trial for misdirection was discharged.

There was judgment for the plaintiff and the defendants appealed.

*J. H. Wilson*, for the plaintiff.
*Alexander*, for the defendants.

Daniel, J. It was the duty of the sheriff, after he received the note for collection, to have had a judgment rendered on it, and an execution issued against Johnson in a reasonable time. And then it was his duty to have gone to the house of Johnson, in search of property to levy on. If the sheriff had pursued this course, he must have found property, worth as much as the amount of the execution. He had no right to return *nulla bona*, without making any effort to find property at the residence of the defendant in the execution, or making any demad of payment or enquiry for property. The general report, that Johnson was insolvent, did not excuse the sheriff in his negligence. We may be very certain, that, if the debt had been the sheriff's own, he would have made inquiries, which would have led to the seizure and sale of the debtor's property. We think the judgment must be affirmed.

Per Curiam. Judgment affirmed.

## CALEB OSBORNE *vs.* BAKER BALLEW.

The copy of a grant from the Register's Office is good evidence, where the production of the original is, from any cause, dispensed with.

The case of *Candler* v. *Lunsford*, 4 Dev. & Bat. 19, cited and approved.

Appeal from the Superior Court of Law of Ashe County, at the Fall Term, 1846, his Honor Judge Dick presiding.

This was an action of trespass *quare clausum fregit*. The writ issued in March 1841.

The plaintiff produced and read in evidence a conveyance made to him by one Dobson, in the year 1836, which covered the *locus in quo*, and proved that he took immediate possession under it, and that he is still in possession. To shew the trespass he gave in evidence the copy of a grant to the defendant, bearing date in 1840, which covered the land in dispute, and alleged that the trespass consisted in running and marking the lines, preparatory to the taking out of his grant. He further alleged, that, before the land was entered by the defendant, it had been granted to another person. To prove this, he offered in evidence the copy of a grant, from the Register's office of Ashe County, where the land lay; and at the same time, filed his own affidavit, that the grant was not in his possession, and those of other persons that it could not be found. The plaintiff, further, disclaimed deriving any title under it. The introduction of the copy was opposed by the defendant; *first*, because a copy from the office of the Secretary of State was better evidence, and, *secondly*, because the plaintiff had not accounted for the original. The Court rejected the evidence. The plaintiff, in submission to the opinion of the Court, suffered judgment of nonsuit to be entered, and appealed.

No counsel for the plaintiff.

*Boyden* and *Iredell*, for the defendants.

NASH, J. If this were a case, in which the plaintiff was bound to produce the original grant, he had entitled himself to the use of secondary evidence, by his own affidavit and those which were tendered. As the latter were not read, we are to presume, they were dispensed with, as unnecessary, and that the fact was as alleged, that the grant could not be found. But the plaintiff was not bound to account for the original. The copy offered was that of a grant, under which he did not claim title, and to the possession of which he had no right. The plaintiff was entitled to give in evidence a copy of the grant in question, *Candler* v. *Lunsford*, 4 Dev. & Bat. 19: and the only enquiry on this point is, was he entitled to use the copy tendered. It is objected that he was not, because a copy from the Secretary's office was better evidence. It is a presumption of law, until the contrary appears, that the grant was recorded, as directed in the Act; and we are of opinion that the objection is untenable. It is founded on the principle, that the best evidence, within the power of the plaintiff, had not been offered by him—that better testimony was behind, to-wit. a copy from the Secretary's office. It is a general rule, that the best evidence shall be produced, to prove every fact in controversy, which the nature of the case admits and which is in the power of the party; in other words, secondary and inferior testimony shall not be substituted for that, which is of a higher and superior character. The rule is one of policy and is founded on the suspicion of fraud. For if, from the nature of the transaction, it is evident, that there is better evidence of the fact to be established, which is not produced, a presumption at once arises, that it is withheld, because its production would be injurious to the party offering the inferior testimony. But in this case the testimony offered, and that which, it

is alleged, ought to have been offered, are both secondary and not primary. It is admitted, a copy from the Secretary's office would have been legal evidence. What would that be but a copy? It would have been admissible, because it was the copy of a record. The rule, requiring the best evidence to be produced, being intended to guard against fraud, its operation ceases, when that presumption does not arise. It does not arise in the case of a record, and its production is, therefore, dispensed with and a copy substituted. To require the production of the record would often be inconvenient. 1 *Stark. Ev.* 393. 2 *Steph. N. P.* 1514. The copy, then, of a grant from the Secretary's office is the copy of a record, *Candler* v. *Lunsford*, 4 Dev. & Bat. 19; and a copy from the register's office is a copy of the original grant. The grant is, in fact, the original in each case. Each, therefore, is but secondary evidence; and in such case, there are no degrees. When a party is entitled to give such evidence, he may give any species of it at his pleasure. 2 *Steph. N. P.* 1517. Nor is it any objection that the copy from the Register's office may be weaker in its effects, than one from the office of the Secretary of State, or that all the testimony of the same grade has not been produced, that might. Thus the contents of a notice to produce a letter may be proved by any one, who knows its contents, without calling the person, who wrote it—and hand-writing may be proved, without calling the writer himself.

His Honor therefore erred in rejecting the copy of the grant from the Register's office.

PER CURIAM. Judgment reversed and *venire de novo*.

## LEONARD E. THOMPSON *ex.* ROBERT W. FORD.

Where a slave has been conveyed by deed in trust for the payment of debts, a sale of such slave, under an execution against him who executed such deed, is not valid, at least while any of the debts remain unpaid.

The indorsement by such a trustee on the deed, "that he had sold (a certain negro) and satisfied the claims mentioned in the within deed and retained a balance of $ in my hands," does not purport or amount to a conveyance by him, but only shews, that he then no longer held the title for the creditors secured in the deed, as one of the trusts, on which he took it originally, but only for the maker of the deed, or such persons, as might be entitled through him, either by contract or act of law.

The case of *Brown* v. *Graves*, 4 Hawks 342, cited and approved.

Appeal from the Superior Court of Law of Lincoln County, at the Spring Term, 1847, his Honor Judge SETTLE presiding.

This is an action of trover, for a slave named Willis, in which, the defendant pleaded, not guilty. It came before the Court upon the following case agreed.

On the 24th of February, 1842, William Fullenwider, of Lincoln County, then the owner, conveyed the said Willis and a woman named Eliza, by deed of trust, to the plaintiff, in trust to sell. and, out of the proceeds, pay certain debts, in the deed mentioned; and the deed was proven and registered on the same day. Payments were made on the debts secured by Fullenwider, so as to reduce them considerably during the year 1842. In June, 1842, Jacob Ramsour recovered two judgments against Fullenwider: one, for $136 17 1-2, and the other for $1,087 25; and he issued writs of *fieri facias* thereon, and raised the sum of $123 21, by the sale of some land: and as to the residue there were returns of *nulla bona*, in September 1842. In October following Ramsour exhibited his bill in the Court of Equity, against Fullenwider and Thompson, charging that the two slaves were of value, more than sufficient to discharge the balance of

the secured debts, then unpaid, and praying to have his debts satisfied out of the surplus; and that suit is still pending. On the 5th of January, 1843, the negro Willis was taken out of the possession of the present plaintiff, by a constable, upon two justices' executions against Fullenwider, for about the sum of $102, and delivered by him to Fullenwider: and Fullenwider immediately sold the negro to the present defendant, at the price of $600, whereof the sum of $102 was applied to the payment of the executions in the constable's hands, and the residue of $498 credited on a debt, which Fullenwider owed Ford; and then he, Ford, carried the negro to Cabarrus County, where he resided. Shortly afterwards the negro returned to the possession of the plaintiff and he kept him about a month. He was then enticed away, by some person unknown, and carried back to Cabarrus, and was then seized by the sheriff of that county, under a *fieri facias* issued on a judgment in Lincoln Superior Court, in favor of John F. Cowan against said Fullenwider and another, bearing teste the second Monday after the third Monday of February 1843; and he was sold, at the price of $600, on the second day of June 1843, to the present defendant, who has since held the negro and claimed him, as his own.

On the 5th of June, 1843, the plaintiff sold the woman Eliza, for the sum of $362, and then made on the deed and signed an entry, in the following words, "Sold negro Eliza for the sum of $362 and satisfied the claims mentioned in the within deed, and retained a balance of $247 01 in my hands."

After filing his bill, Ramsour sued out other writs of *fieri facias* on his judgments, and, after indemnifying the sheriff, had some personal property sold, which was claimed by other persons, and thereby raised on the one execution the further sum of $54, and on the other that of $447 05.

This suit was brought in September, 1843; and, upon the case agreed, judgment was entered for the plaintiff for a sum specified therein, for which it was to be entered, in case the opinion of the Court should be for the plaintiff, and from the judgment the defendant appealed.

*Thompson* and *Williamson*, for the plaintiff.
*Boyden* and *Iredell*, for the defendant.

Ruffin, C. J. The Court can take no notice of the rights of Ramsour, arising out of the filing and prosecution of his bill in the Court of Equity. It belongs to that Court, to vindicate its jurisdiction, by dealing with persons, who violate rights created by a *lis pendens* there.

Sitting in a Court of Law, we cannot judicially know, how a Court of Equity will apply an equitable fund, of this sort, to the satisfaction of creditors, or as between the creditors and the assignee of its owner. We can look only to the legal rights of the parties to this record. But confining ourselves even to that limit, we hold that the plaintiff must recover. The plaintiff got the legal title, by the conveyance of Fullenwider, and it has never been divested out of him and gained by the defendant, of course the defendant took nothing by his purchase from Fullenwider himself. Nor did he get a title under the purchase from the sheriff, because the negro, at the time he was seized and sold, was not liable to execution and consequently the sale passed nothing. The second section of the Act of 1812, which authorizes the sale of an equity of redemption, is confined to a mortgage of lands, tenements, rents and hereditaments; and, therefore, this case is not within that clause of the Act. Nor is it within the first section, although that extends to both lands and goods; because, on the second of June, 1843, when the defendant purchased, there was a balance due on the debts secured by the deed and the same remained due, until the 5th of that month, when it was paid out

of the proceeds of the sale, then made of the other negro, by the plaintiff. At the sale to the defendant, therefore, the negro Willis was not held by the plaintiff upon a pure and simple trust for Fullenwider, the defendant in the execution, but upon a mixed trust, for him and the creditors secured in the deed; and that is not within that section of the Statute, *Brown* v. *Graves*, 4 Hawks. 342, and the sale to the defendant passed nothing.

The memorandum made on the deed and the facts stated in it, did not determine the plaintiff's title. They do not purport or amount to a conveyance by him, but only show, that he then no longer held the title, for the benefit of the creditors secured in the deed, as one of the trusts, on which he took it originally, but only for Fullenwider or such persons, as might be entitled through him, either by contract or act of law. Still the legal title was left in the plaintiff and that entitles him to judgment in this action.

PER CURIAM. Judgment affirmed.

N. E. AND J. LUDWICK vs. SOLOMON FAIR AND ADELINE HIS WIFE.

A defendant, who is sued upon a judgment, obtained before a Justice of the Peace, has no right to plead that he was an infant, when that judgment was rendered.

A judgment by a Justice of the Peace, though not a matter of record, determines, between the parties, their respective rights in the matter of controversy. Neither party can, in a subsequent proceeding to inforce it, deny or contest the matters of fact, ascertained by it.

Appeal from the Superior Court of Law of Cabarrus County, at the Fall Term, 1846. his Honor Judge Dick presiding.

The plaintiffs had obtained a judgment against the defendant, Adeline, before her intermarriage with the other defendant. That judgment lay dormant for 12 months and more, when the warrant in the present case, on the former judgment, was issued against both the defendants. The case was taken to the County Court by appeal, when the defendants pleaded, the general issue and former judgment. In the Superior Court, to which the case was carried, it was tried on the same pleas as in the County Court. On the trial, the defendants alleged and were allowed to prove, that the defendant, Adeline, was, at the time of the rendition of the first judgment, and then was, an infant. The Court held, that the defence could not avail the defendants in this action. A verdict being rendered for the plaintiff and judgment rendered thereon, the defendants appealed.

*Thompson*, for the plaintiff.
No counsel for the defendants.

NASH, J. In the opinion of his Honor below we concur. The judgment of a Justice is not a matter of record, but

to many purposes, it has the qualities of one. It determines, between the parties, their respective rights in the matter in controversy. Neither party can, in a subsequent proceeding to enforce it, deny or contest the matter of fact ascertained by it. In an action of debt upon it, as this is, its validity cannot, in pleading, be impeached or affected by any supposed defect or illegality in the transaction, on which it is founded; and, consequently, it is not necessary to state the circumstances or consideration, on which it is founded. 1 *Chit. Pl.* 354. It is well settled, that, in pleading to a *scieri facias* to revive a judgment or to an action of debt upon it, no matter of defence can be pleaded, which existed anterior to the recovery of the judgment. 3 *East* 258. 4 *East* 311. The infancy of the defendant, Adeline, at the time the first or original judgment was obtained, might have been a good defence. She either did make it on that trial or she did not. If she did, it is then *res adjudicata*, and she is concluded by it, as the judgment is in full force. If she did not, then she is, by the principle before stated, excluded from making it now. That judgment not only ascertained the amount due to the plaintiff, but that she was *in law* bound to pay it. But an effectual answer in this case is, that the plea of infancy was not tendered by the defendants. When she married the other defendant, Solomon Fair, it was an existing debt of hers, and in this action the plaintiff has a clear right to recover it.

Per Curiam, Judgment accordingly.

W. W. DAVIS *vs.* WILLIAM T. COLEMAN & AL.

The alteration of a bill or note in a material part vacates the bill or note, except as between the parties consenting to such alteration.

Cutting off the name of one of the makers of a promissory note, and substituting another, is a material alteration.

A payment made by one of the makers of a promissory note, within three years, will take the debt out of the statute of limitations as to all.

Where the contract for the loan of money is made in Georgia, it will bear Georgia interest, though the note for the amount loaned be executed in this State.

The cases of *Arrington* v. *Gee*, 5 Ired. 590, and *McQueen* v. *Burns*, 1 Hawks 476, cited and approved.

Appeal from the Superior Court of Law of Henderson County, at the Spring Term, 1847, his Honor Judge Dick presiding.

This was an action of debt, brought on a promissory note, executed by William T. and George S. Coleman, as principals, and William Coleman and J. F. E. Hardy, as sureties, payable to the plaintiff. The defendants pleaded the general issue, payment, statute of limitations, and statute against usury. The note bears date the 25th of November, 1836. The facts agreed on by the parties were as follows. The plaintiff was, and now is, a citizen of the State of Georgia, but, for several years before and since 1836, spent the summer months in the County of Buncombe, State of North Carolina, William T. and George S. Coleman were merchants and partners doing business in the town of Asheville, North Carolina, under the firm of Wm. T. & Geo. S. Coleman in the year 1836, and for some time after. The note was originally made by Wm. T. & Geo. S. Coleman, William Coleman and John Osborne. After the note had stood three years, Osborne became dissatisfied, and it was agreed by W. W. Davis, the plaintiff, William T. Coleman, John Osborne, and J. F. E. Hardy, that Osborne's name should be cut

off the note and that J. F. E. Hardy should sign it, which was done accordingly, in the town of Asheville, North Carolina. George S. Coleman was not present and had no knowledge of the change being made. This change in the note was made in November 1839. The copartnership between Wm. T. & Geo. S. Coleman expired in the year 1838. It was further agreed that William T. Coleman, on the day of January 1840, executed a deed in trust to one Isaac T. Poor, by which deed he conveyed to the said Poor all the partnership effects, for the purpose of paying the creditors of the firm, and the note on which this suit is brought is mentioned in the said deed, as one of the debts to be paid out of the said effects. Poor, the trustee, made sundry payments on the said note during his lifetime, one of which was within three years before this suit was brought. The executor of the said trustee made payments on the said note out of the partnership effects within three years before the commencement of this suit.

The defendants contended, *first*, that the cutting off of Osborne's name and the signing by Hardy, without the consent of all the parties to the note, rendered it void, so that no suit could be brought on it. *Secondly*, that if the note was not void, it could take effect only from the signing by Hardy, and was a new instrument, made in North Carolina. *Thirdly*, that the note was barred by the statute of limitations, and the payments made by the executor of Poor, the trustee, would not take the case out of the operation of the statute. *Fourthly*, that the note was infected with usury and therefore void. Evidence was given to shew that the note was to bear 8 per cent. interest, that being allowed by the laws of Georgia. The note bore date at Augusta, Georgia.

The Court charged the jury, that the cutting off of Osborne's name and the signing by Hardy did not destroy the note, but the plaintiff would be entitled to recover the amount due on it, unless it was infected with usury

or barred by the statute of limitations. The Court further charged the jury, that the trustee, Poor, having made sundry payments on the note out of the funds of the co-partnership, by the direction of William T. Coleman, and one payment being within three years before this action was brought, and the executor of Poor having also made payments on said note out of said funds, all of which were within three years before action brought, the statute of limitations did not bar. The Court further charged the jury, that, if they believed from the evidence, that there was a corrupt bargain made between the plaintiff and the defendants William T. and George S. Coleman in the State of North Carolina, for the purpose of securing to the plaintiff more than six per cent. on the money loaned, and that the note was dated "Augusta, Georgia," for the purpose of giving a false coloring to the transaction, when in fact the contract was fully consummated in North Carolina, the note would be void, and they ought to find for the defendants. The Court further charged the jury, that, if they found there was no such corrupt intent to evade the statute against usury, yet if they found that the contract was fully consummated in North Carolina, although the note was dated "Augusta, Georgia," they ought not to allow the plaintiff more than six per cent. interest. But, if they found, that the note was in fact made in Augusta and to be paid in Augusta, and it was not infected with usury, the plaintiff was entitled to recover the balance due with eight per cent. interest on the principal money, that being the rate of interest in the State of Georgia.

The jury found a verdict for the plaintiff for the balance due on the note, and further found that the note was made in Augusta and to be paid in Augusta, and allowed interest at eight per cent. on the principal money due. The defendants moved for a new trial, which was refused, and judgment being rendered for the plaintiff, the defendants appealed.

*Baxter*, for the plaintiff, as to the statute of limitations cited 2 *Leigh* 1265 *to* 1270. *Walton* v. *Robinson*, 5 Ired. 341. As to the alteration in the note, 1 *Leigh* 390. As to the usury, *McQueen* v. *Burns*, 1 Hawks. 476, and the authorities there referred to.

*Gaither* and *Avery*, for the defendant.

DANIEL, J. The Judge charged the jury, that the cutting off from the note the name of Osborne did not destroy it, and the plaintiff was entitled to recover notwithstanding. The plaintiff had a verdict and judgment against William Coleman, (who was not present, when the alteration in the note was made, and who never assented to the making of the alteration,) and J. F. E. Hardie. We do not agree with his Honor; for we think, that the alteration of a bill or note, in a material part, vacates the bill or note, except as between the parties consenting to such alteration. *Downs* v. *Richardson*, 5 Barn. and Ald. 674. 1 Steph. N. S. 788. The cutting off the name of one of the makers of the promisory note and substituting that of another was a material alteration of the note, and vitiated it as to William Coleman, for he agreed to be bound with Osborne, and it may be that Hardie is not a substantial co-surety. *Secondly*, we concur with his Honor, that the action was not barred by the statute of limitations. William T. Coleman, one of the makers of the note, made a payment on it by his agent Poor, within three years next before the commencement of this action. Poor had funds placed in his hands by William T. Coleman to aid in paying this very note, and he did aid in paying as aforesaid. This payment, made by one of the makers of the note, according to numerous decisions, took the case out of the act of limitations, as to all the other makers of the note. Cases were cited to shew, that dividends, received by the creditor under a commission of bankruptcy against one of the joint debtors, will not repel the statute as to the others; and we approve of those cases, because there

the payments are by the force of the law, and are not the acts of the parties. But the payments here are made by the debtor himself, or under his authority by his agent and out of his funds: which distinguishes this from the other cases. *Thirdly*, the money was loaned by the plaintiff to the Messrs. Coleman in Georgia, and the note for the re-payment was then and there given. The fact, that Hardie, by the consent of the plaintiff and one of the borrowers, placed his name on the paper, as one of the makers of the note, in North Carolina, did not make it, as to him, a North Carolina contract. The name of Hardie on the note, without a consideration, would only have been a *nudum pactum*. It was the loan, made in Georgia by a Georgia citizen, that constituted the consideration of the note, not only as to the parties, that originally made it there, but as to Hardie, who subsequently signed the paper here. It is a case like that of *Arrington* v. *Gee*, 5 Ired. 590. The original contract of loan having been in Georgia, even a note given here might properly reserve Georgia interest, *McQueen* v. *Burns*, 1 Hawks. 476. Therefore this note, purporting to be given in Georgia, though executed by Hardy here, is no evasion of our law against usury, but properly drew eight per cent. interest, which is admitted to be the rate in that State.

We think the judgment must be reversed, because the Judge charged, that the plaintiff was entitled to recover against William Coleman, although he did not assent to the alteration made in the note. The recovery ought to have been against Hardy only.

Per Curiam. Judgment reversed and *venire de novo*.

## DOE ON DEMISE OF JESSE DICKSON vs. REUBEN PEPPERS.

The officer, making a levy on land under an execution from a Justice of the Peace, must make his return of the land he has levied on, on the judgment and execution, when they are on one and the same piece of paper; or on the execution when they are on different ones; or on some paper annexed to the one or the other, and which would constitute a part of it and have to be recorded with it. A sale made under an execution issuing on such return is void.

Appeal from the Superior Court of Law of Ashe County, at the Spring Term, 1846, his Honor Judge CALDWELL, presiding.

The only question in this case was, as to the sufficiency of the return, by a constable, of a levy made on the land in dispute. A judgment had been obtained, before a Justice of the Peace, against this defendant, and an execution was issued to a constable, who made the following return: "No goods and chattels to be found, levied on land as per notice filed." The notice was produced, and it set forth, among other things, that the constable had levied on the land of the defendant, where he lived, &c. Upon this return the County Court rendered judgment, condemning the land; and, an execution having issued pursuant thereto, the plaintiff became the purchaser at the sale. This action is brought by the purchaser, against the defendant in the execution, to recover the possession. On behalf of the defendant it was objected, that the order of the County Court, under which the land was sold, was void, for the want of a proper levy, and the sale conveyed no title to the purchaser. Of this opinion was the presiding Judge, who decided, that the levy, to be legal, must be indorsed on the judgment and execution, or on the execution, and could not be made by reference to another paper, and that the order of the

County Court, awarding an execution, was irregular and void. In deference to this opinion, the plaintiff, having submitted to a judgment of non-suit, appealed.

No counsel for the plaintiff.
*Iredell*, for the defendant.

Nash, J. We concur with his Honor, that there was no sufficient return of a levy in this case. The paper, to which reference was made by the officer, who was entrusted with the execution of the process, was not attached to the execution or judgment. And to this fact, it must be presumed, the presiding Judge had allusion in saying, "that the levy could not be made out by reference to another paper," because, if attached, it would constitute a part of the paper itself, and could not, with propriety, be said to be referred to. As to the insufficiency of the levy, there can be no doubt, upon an inspection of the Act, directing the manner, in which the officer shall perform his duty. It directs him, upon an execution from a Justice of the Peace coming to his hands, to levy on the goods and chattels, &c. and, for want of goods and chattels, to levy on "the lands and tenements" &c. "and make return thereof to the justice, who issued the same, setting forth *on the execution* the money, &c. "and what lands and tenements he hath levied," &c. It further provides, "and the justice, to whom the return is made, shall return such execution, with all the other papers, on which the judgment was given, to the next Court to be held for his county," and the clerk of the Court shall "record the whole of the papers and proceedings had before the justice," *Rev. Stat. ch. 62, sec. 16.* This last clause explains why it is, the Legislature required the return to be indorsed on the execution; it is that it might be made a record of. Justices' Courts are not Courts of record; and sound policy did not permit, that the title to real property, acquired under the

action of the law, should be trusted to their frail memorials. To enable the County Court to act advisedly and to know what land they were called on to condemn, it was necessary that the proceedings before the magistrate should be filed on their records; ascertaining, with legal certainty, the land levied on. They constitute their warrant for proceeding to condemnation, without which they cannot act, or, if they do proceed, their action is void. To the purchaser under such an execution the provision is all-important. It preserves to him the evidence, upon which his title to the land rests. If other land than that levied on is sold by the officer, the purchaser acquires no title. By pursuing and observing the provisions of the Act, the land is effectually indentified, and his evidence is perpetuated for him. The officer, then, making the levy must make his return on the judgment and execution, when they are one and the same piece of paper, or on the execution when they are different ones, or on some paper annexed to the one or the other. In this case, the paper referred to by the officer was not attached to either the judgment or execution, but is the notice required to be given to the defendant, five days before Court, by the officer making the levy. This notice is the act of the officer, with which the Justice had nothing to do, and it was not to be returned to him. The law does not require *it* shall be recorded. Being a loose piece of paper, it might very easily be lost, to the great injury of the purchaser. The objection to the plaintiff's right of recovery lies upon the face of his title, and the defendant is at liberty to avail himself of it.

Per Curiam. Judgment affirmed.

DEN ON DEMISE OF JOHN B. S. HARRIS & AL. *vs.* JOHN IRWIN.

When land has been sold by a sheriff under an execution and he dies before making a conveyance, the succeeding sheriff cannot make the conveyance, unless the purchase money has been paid to the sheriff who sold.

Appeal from the Superior Court of Law of Mecklenburg County, at a Special Term in November 1846, his Honor Judge PEARSON presiding.

This was an action of ejectment, in which the plaintiff and defendant both claimed title to the land in question under one Penman. The title of the plaintiff consisted of a sheriff's conveyance, under a judgment and execution against Penman. The sale was in October 1839, and the sheriff's deed dated the 4th of November, 1839. The proceedings were all regular. The defendant's title was as follows. At April term 1838, of the County Court of Mecklenburg, Joseph H. Wilson obtained a judgment against Penman for a large sum of money, upon which an execution issued, and was, by J. McConapay, the then sheriff of the County, levied on the land in question. The levy was made on the 1st of October 1836, and the execution returned "not executed for want of bidders." A *venditioni exponas* was issued to the April term 1839, and the land was sold by McConapay, on the 28th of January, 1839, after he had gone out of office. Joseph H. Wilson, the plaintiff in the execution, was the purchaser. In his return the sheriff stated that no money was paid, and that when paid it was applicable to other executions. McConapay went out of office in November 1838, and was succeeded by one Alexander, by whom the deed was made to Wilson, and, at that time McConahay was dead. The case further shews, that, after the sale by McConahay,

several other executions issued under the judgment of Wilson. The deed from the sheriff Alexander to Joseph H. Wilson bears date the 24th of May, 1845, and recites the *venditioni exponas* to McConapay, and contains a receipt for the money, as paid to him, Alexander, by Wilson. The Court was of opinion that Alexander had no authority to make the conveyance to Wilson. Thereupon a verdict was rendered for the plaintiff and from the judgment, pursuant to the verdict, the defendant appealed.

*Boyden*, *Guion*, and *Iredell*, for the plaintiff.
*Wilson*, and *Alexander*, for the defendant.

Nash, J. On the trial of the cause below, several questions were made. Only one was decided by his Honor, and as we concur with him in opinion on that point, we have not, as it would otherwise been our duty to do, looked into the others. His Honor decided, that the deed from Alexander to Joseph H. Wilson, under which the defendant claimed title, was void, as being made without any authority in law. The objection is, that the power given by the Legislature to a sheriff, to make title to lands sold by his successor in office, is a special one and must be strictly pursued. In this case the purchase money, bid by Wilson, the purchaser, was not paid to McConapay, the officer by whom the purchase was made, but to Alexander, his successor in office. If the latter had any authority in law to receive it, then his deed might be good—if he had no such authority, it is not. All the acts, which have been passed by the Legislature on this subject, confine the power of a sheriff, out of office, to execute a deed for land sold by him, while in office, to the case where the money has been paid. This is the language of the Act of 1784, the first on the subject. It provided, that "where a sheriff or coroner has heretofore sold any lands, &c. and has not executed deeds for the same, such sheriff or coroner, though he be now

out of office, shall and he is hereby required to seal and execute a deed of bargain and sale for such lands, to such person or persons, who have purchased at vendue and *paid the money* for the same;" and, "in case of his death or removal out of the State, then his successor is to make the deed as is herein next before directed." The same direction is contained in the Act of 1799, and in that of 1838; the Acts differing only, in extending the provisions on the subject to deeds made after the periods of their respective passage, as well as to those made before. Through all these acts, then, the same provision is found; that, when a sheriff makes a sale of land under an execution, which has begun to run, and his term of office expires, he can make a deed or conveyance of it, *if the purchaser has paid the money.* The payment of the money is a condition, and it must be paid to him, as he is the only officer of the law, authorized to receive it. In this case the execution had begun to be executed by McConapay. He had levied the *fieri facias* upon the land in question, the *venditioni exponas* had been directed to him, and under it he sold and returned to the Court, that the money was not paid by the purchaser. The new sheriff, Alexander, was not the returning officer, and had no process nor power to receive the money. The money was not received by him in his official character. The authority, which sheriffs have to execute a conveyance under such circumstances, is derived solely from the acts above referred to. It is a special delegation of power and must be strictly pursued. If one departure from the requirements of the law is permitted, it will necessarily introduce others, until at length the law, as established by legislative will, will give way, and be superseded by the law of convenience. If it were necessary to investigate this case further, there are discrepancies between the return of the old sheriff, McConapay, and the deed of the new sheriff, Alexander, which would require explanation. But, believing as we do, that the authority given to Alex-

ander by the Act of 1838 was a special one, and being of opinion, that the case had not arisen, in which he had any power to make the deed, under which the defendant claims, we are of opinion that it is void and conveyed to the defendant no title.

PER CURIAM. Judgment affirmed.

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HORATIO THOMPSON vs. L. D. CHILDS.

When a submission to arbitration is by bond and an award is made, if the award be for the payment of money, a suit may be brought either on the bond or on the award, at the option of the party claiming benefit under it.

Appeal from the Superior Court of Law of Lincoln County, at the Spring Term, 1847, his Honor Judge SETTLE presiding.

This was an action of debt upon an award and the case was this. The plaintiff and defendant, having mutual claims, by bond, bearing date the 4th of February, 1846, submitted the matters in dispute to the arbitrament of L. E. Thompson and W. Williamson, who made their award on the 7th of the same month, and duly notified the parties thereof. In the award the arbitrators decide that the defendant owes to the plaintiff the sum of $1732 52 and adjudge that he pay it. The objections made by the defendant to the plaintiff's recovery were all over-ruled by the Judge, and from the judgment given

in favor of the plaintiff, the defendant appealed. The objections are stated in the opinion delivered in this Court.

*Thompson* and *Williamson*, for the plaintiff.
*Alexander* and *Guion*, for the defendant.

NASH, J. On the trial below, several objections were taken to the plaintiff's right of recovery, all of which were properly overruled by the presiding Judge. The first is, that the action ought to have been brought on the bond of submission. It may be brought on either at the option of the plaintiff, where the award is for the payment of money, 2 *San.* 62, *v.* 5. *Caldwell on awards* 190, 192. The second objection is to the award, that it does not correspond to and agree with the submission. The words in the bond are, "all manner of accounts, debts, *dues* and demands;" the matters taken into consideration and passed upon by the arbitrators, are "all matters of account, debts, *claims* and demands." The only difference between the two instruments is in the substitution in the latter, of the word *claims* for that of *dues* in the former—substantially they are the same. The third objection is, that the arbitrators had not decided upon or taken into their consideration a bond for $500, held by the plaintiff on the defendant, and that, therefore, their award was incomplete. With respect to this bond, it appeared that, before the matters in dispute were referred to Thompson and Williamson, they had been referred to other arbitrators, who had made an award in favor of the plaintiff. The defendant then offered to give to the plaintiff his bond for $500, if he would consent to set aside that award, and refer the matters in dispute to Thompson and Williamson, and would stand to, abide by and perform their award. The plaintiff agreed to the proposition, and the $500 bond was executed and placed in the hands of Thompson as an escrow. When the award was made, a copy was handed to the plaintiff by Thompson and he

expressed his willingness to abide by it, whereupon the bond was, by Mr. Thompson, delivered to him. The exception by the defendant is, that the arbitrators did not in their award pass upon this bond. The answer to the objection is a simple one. If that bond constituted a debt, within the terms of the submission, then it was passed on by the arbitrators, and constitutes a portion of the $1732 52, awarded by their judgment—if it did not come within those terms, the arbitrators had no power to take it into their consideration, and their not doing so constitutes no error on their part. Whether the bond was or was not within the submission, we do not decide, as the question is not before us. That question cannot arise, until a suit be brought on that bond, and the defendant plead the award in bar. The arbitrators, in their award, do not profess to be guided in their decision by the principles of law, and, if they did, no error in that particular has been pointed out to us, nor do we perceive any. We see no error in the opinion of the Court below.

Per Curiam. Judgment affirmed.

JAMES W. PATTON *vs.* SAMUEL SMITH.

An attachment, served in the hands of a garnishee as a debtor, is substantially an action at law by the defendant in the attachment, and, therefore, the plaintiff in the attachment cannot recover against the garnishee, in a case in which the defendant in the attachment could not have recovered the same debt.

The case of *Gillis* v. *McKay*, 4 Dev. 172, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Spring Term, 1847, his Honor Judge DICK presiding.

This was an action of assumpsit, on the defendant's acceptance of an order drawn on him by one Newland, in favor of the plaintiff for $123, expressed in the order to be "the balance in your hands on the McCraw note, when collected." It was tried on *non assumpsit*. On the trial the plaintiff did not produce the order; and, to account for not doing so, he gave evidence to the Court, that there had been a former trial of this suit, and that the order was then produced by the plaintiff's counsel and proved; and one of the gentlemen, who was of counsel for the plaintiff on that trial, stated that he had it at that time and supposed he had put it among his client's papers in cases in that Court; but that, upon diligent search, he could not find it among his papers, and, therefore, he believed, that it was left with the Clerk of the Court among the other papers of the cause. Another gentleman, who was also of counsel with the plaintiff at the former trial stated that it was not in his possession, and that he believed it was put away among the papers in the cause by the counsel or jury, and left with the Clerk. The Clerk then stated, that he had no recollection of having the paper, and that he had diligently searched all his files

of the term of the former trial, and had not been able to find it. Upon that evidence, the Court allowed the plaintiff to prove the contents of the instrument and its execution by the drawer and acceptor.

The plaintiff further gave evidence, that Newland held a note on one McCraw for $800, payable in the summer of 1838, and was indebted to the defendant in the sum of $677, and, for the purpose of paying it, that he transferred to the defendant on the 3rd of July, 1838, McCraw's note, either by endorsement or delivery, it did not appear which, leaving a balance of $123 due on McCraw's bond belonging to Newland, when it should be collected. For that balance this order was drawn and accepted, as above stated, in order to pay that sum, which Newland owed to the plaintiff. The plaintiff further gave evidence, that McCraw was entirely solvent, and that in 1839 the plaintiff called on the defendant for payment of his acceptance, when he replied, that the money had been taken out of his hands by attachments, at the instance of other creditors of Newland, and therefore he refused to pay the plaintiff.

The counsel for the defendant insisted, that, to entitle the plaintiff to recover, he ought to shew, that the defendant had collected McCraw's note, and that there was not sufficient evidence of that fact; and he prayed the Court so to instruct the jury. The presiding Judge thereupon stated to the jury, that they ought not to find for the plaintiff, unless they were satisfied, that the defendant had collected the debt from McCraw, when the plaintiff demanded payment from him; and that there was evidence given for the plaintiff, from which they might find that fact.

The counsel for the defendant further prayed the Court to direct the jury, that, as the plaintiff did not prove that McCraw's note was indorsed to the defendant, the sum of $123, claimed by the plaintiff, was subject to be attached by other creditors of Newland, and, consequently, that the plaintiff could not recover; which instruction

the Court refused to give. There was a verdict for the plaintiff and a judgment, and the defendant appealed.

*N. W. Woodfin*, *Edney* and *Gaither*, for the plaintiff.
*Francis*, for the defendant.

RUFFIN, C. J. We think the evidence of the loss of the instrument was sufficient to let in proof of its contents. The affidavit of the plaintiff might have been added, and doubtless would have been required, if it had appeared, that he had the possession at or after the former trial, or if there had been evidence to raise a probability that it had since come to his hands. But there was no suggestion, that the plaintiff was even present, when the case was first tried, or that there was any opportunity for him to get the paper. The counsel distinctly stated, that they, and not their client, had it in possession, and that it was kept after the trial either by one of them or the clerk; and upon search by all those gentlemen, in whose custody it certainly had been, it has not been found, and that sufficiently establishes the loss for the purposes of this question.

There was, certainly, evidence to be left to the jury of the collection of the money from McCraw by the defendant. Indeed, although it was not direct evidence, it was little less convincing. The debtor was good for the money, and it had been due about six months before the plaintiff's demand, and the defendant did not shew on the trial, that he had been put to a suit on the note, or produce or give any account of it; and, especially, when asked for payment, the defendant did not say, he had not collected the money, but impliedly admitted that he had by the strong negative pregnant, contained in his declaration, as the reason for refusing payment, that the money had been attached in his hands by Newland's creditors.

The Court properly refused to give the last instruction, for several reasons. The jury ought not to be charged

upon abstract points, to which there is no evidence; and here no such attachments were shewn as those supposed. Besides, if there had been, they could not have protected the defendant, because he had engaged to pay the plaintiff on the single condition, that he should collect the money from McCraw, and, having done so, his engagement became absolute. Under those circumstances, moreover, the money was not liable to attachment, if that were material, for, clearly, Newland could not have recovered the money from the present defendant; and, consequently, it could not be attached by a creditor of Newland, since an attachment, served in the hands of a garnishee as a debtor, is substantially an action at law by the defendant in attachment. *Gillis* v. *McKay*, 4 Dev. 172. The defendant would have had nothing to do, but state the facts in his garnishment, and they would have shewn, that the money did not belong to Newland, because he had accepted his order for it in favor of another person. That would have been equally true, whether the bond was assigned or not; for if, in the latter case, he acted, in a legal sense, as the agent of Newland in collecting the money, yet, when collected, he had a right to hold it for himself, as the fund, on which his acceptance was founded. In every point, therefore, the opinions given by his Honor were correct, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

JESSE WILLIAMS *vs.* GEORGE CLAYTON.

**The declarations of a vendor, after he had sold property, are not evidence against his vendee, as to the title of the property.**

Appeal from the Superior Court of Law of Buncombe County, at the Spring Term, 1847, his Honor Judge Dick presiding.

This was an action of trover, brought to recover damages for the conversion of two barrels of brandy to the use of the defendant. The plaintiff first introduced a witness, by the name of *Patton*, who stated, that about the 1st of April, 1844, the plaintiff informed him, that he, the plaintiff, had understood, that one Bates, then residing in Hendersonville, was offering forty cents cash per gallon for brandy, and it was agreed between the witness and the plaintiff, that each of them should send two barrels of brandy to Bates. The brandy was sent accordingly by one Byers. Patton further stated, that he expected to get the money for his two barrels of brandy on the return of Byers, but did not receive it. He further stated, that neither Williams nor himself had seen Bates or made any contract with him before the brandy was sent by Byers. Byers was then examined. He stated that he was employed by Williams (the plaintiff) to take the brandy to Bates. He also took a paper from Williams to Bates, which he understood was an order for the money due for the brandy. When he got to Hendersonville, he did not find Bates at his grocery, but was informed that he was at the court-house. He found Bates at the court-house, who stated he was much engaged, and could not attend to receiving the brandy then, and directed the witness to have the brandy placed in his (Bates') yard

and he would attend to it when at leisure. The brandy was placed according to the direction. The witness then presented to Bates the paper sent by Williams. Bates said he could not then attend to it, but he would see Williams and Patton the next week at Buncombe Court. The defendant then introduced one Gilreath, who stated, that the plaintiff was indebted to him on a justices' judgment, and, for the purpose of discharging the same, the plaintiff drew an order on Bates, in the words and figures following, to-wit: "Mr. J. J. Bates, Sir, Pay Penil Gilreath sixty five dollars for the brandy I sold to you. Jesse Williams." This order Gilreath presented to Bates, but it was not paid and was returned to Williams. The defendant then proved, that, after the return of the above order to Williams, Bates, being much indebted to various persons, on the day of 1844, by deed conveyed in trust to the defendant, for the benefit of his creditors, the four barrels of brandy above mentioned and all his other effects, and delivered the brandy to the defendant. The plaintiff then proposed to prove the declarations of Bates, made in the presence of the defendant, after the execution and delivery of the deed in trust and after the delivery of the brandy to the defendant, for the purpose, as he alleged, of shewing, that there was no sale in fact of the brandy by the plaintiff to Bates. The Court rejected the evidence. The plaintiff's counsel prayed the Court to charge the jury, that the facts sworn to by Patton and Byers did not in law constitute a sale and delivery of the brandy to Bates. The Court refused to give the instructions prayed for, but charged the jury, that, if they believed from all the evidence submitted to them, there was a sale and delivery of the two barrels of brandy to Bates by the plaintiff, the property vested in Bates, and he had a right to convey it to the defendant, and the plaintiff was not entitled to recover.

The jury found for the defendant, and a new trial being

moved for and refused, and judgment rendered according to the verdict, the plaintiff appealed.

*Baxter*, for the plaintiff.
*Gaither*, for the defendant.

Daniel, J. Bates assigned by deed the two barrels of brandy, now in controversy, to the defendant. The vendor is never permitted, after he has sold property, to be heard to say, that he never had any title to that property, nor are any declarations of his, made after the sale, whether in the presence of the vendee or not, admissible in evidence to defeat or impair the sale. The Judge did not err, in refusing to receive the evidence offered, of the declarations of Bates, made in the presence of the defendant.

*Secondly*, the plaintiff insisted, that the Court should charge the jury, that the evidence given by the two witnesses Patton and Byers did not, of itself, establish a contract of sale of the brandy. The Court refused; but charged the jury, that, if they believed, from *all* the evidence submitted to them, that there was a sale and delivery of the brandy, then the property vested in Bates. We do not see any error in the Court's refusing to charge on garbled parts of the evidence; as the plaintiff did not pretend to allege, that the residue of the evidence offered by the defendant, to-wit: the order drawn by the plaintiff on Bates, in favor of Gilreath, was a forgery. That order was an admission, in writing, by the plaintiff, of a sale of brandy by him to Bates. It is possible that the order may have been drawn for the price of another lot of brandy. But there is nothing in the case to shew, that the plaintiff ever had any dealings in brandy with Bates, except the single lot carried by Byers. If the plaintiff had insisted, that the order had not been proved to be his, or that it was a forgery, then there would have been some propriety

in his prayer to the Judge to charge as he requested. We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

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## WILLIAM H. THOMAS *vs.* GEORGE W. HOLCOMBE.

Where a warrant is issued against three, and returned "executed," and the judgment is against the "defendant" in the singular, and so also in the entry in the stay of execution, and especially where the Justice, who rendered the judgment, was himself a party defendant, it cannot be determined by the Court against whom the judgment really was.

Appeal from the Superior Court of Law of Cherokee County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

This suit was commenced, June 7th, 1843, by warrant against the defendant, as the endorser of a note, made by Singleton Rhea to William Cunningham, for $45 60, and endorsed by Cunningham to the defendant and by the latter to the plaintiff, Thomas. The plea was, former judgment, and in support of the issue, the defendant produced a warrant, at the suit of the present plaintiff, issued against Singleton Rhea, William Cunningham, and the present defendant George W. Holcomb, in a plea of debt due by note for $45 10, which was returned "executed," and on which judgment was entered on the 5th day of August, 1841, by William Cunningham, a Justice of the

Peace, in the following words. "Judgment against the defendant, by confession to the officer, for the sum of $45 10 principal and interest from the 14th of January, 1841, until paid, and forty cents costs." And a stay of execution was entered also, in the following words, "Defendant prays stay of execution and gives for security A. J. Conner, this 12th of August, 1841," which was signed by Conner and attested by William Cunningham as a Justice. The defendant then proved, that the note, on which this warrant is brought, is the same, as that mentioned in the warrant of August, 1841, and the William Cunningham, who gave the judgment of 1841, is the payer of the note and one of the persons mentioned as defendants in the warrant, on which he gave the judgment, as aforesaid; and the plaintiff thereupon insisted, that the same was not a valid judgment against the present defendant, and did not bar this suit. Of that opinion was the Court and so instructed the jury; and they having found accordingly and judgment being given for the plaintiff, the defendant appealed.

*J. W. Woodfin*, for the plaintiff.
*Francis*, for the defendant.

Ruffin, C. J. It seems that the ground chiefly relied on, in the Superior Court, in support of the decision, was that the judgment was void, because it was rendered by a Magistrate, who was interested to have the judgment entered against the other parties and also was, himself, a party to the suit.

Although it is extremely reprehensible in a judicial officer to sit in a cause, to which he was a party, or in which he is interested, and we suppose that a judgment, given by a Justice of the Peace, on the side of his interest, may be reversed or quashed for that cause, yet the Court is not prepared without more consideration, than we can now bestow, to say, that it is so utterly void, that it may

be so treated, immediately, by the plaintiff, who obtained it, and that as against other parties, than the magistrate himself. The point is not further examined, because the Court holds, on another plain ground, that the judgment does not protect the defendant in this suit. That ground is, that it does not appear to be against him, and it is necessary that it should, in order to constitute a bar. It is true, the warrant was against the three, and it was returned "executed," yet it is not stated on whom it was executed, and the judgment is only "against the defendant" in the singular number, without saying which defendant. So in the entry of the stay, the same phrase, "defendant," is used again. It is to be taken, by a plain implication, we think, that the magistrate was not giving judgment against himself, as he professes to act on an admission to the constable, proved as we suppose, by that person. And moreover, he could not be so silly, as to suppose the stay good, that he would grant to himself. If he was not charging himself by the judgment, it is presumed he did not mean to render one against this defendant, who was his own assignee. It is extremely probable, therefore, that the "defendant" was Rhea, the maker of the note alone, especially as costs are given only for service on one person. But however that may be, we think, this defendant does not establish, that it was against himself; for the "defendant" either meant Rhea, or it is so vague, that it does not designate any one, in particular, and would, for that reason, be ineffectual. We think such a judgment against the "defendant," upon a warrant against three persons, would not justify a sale of this defendant's goods on an execution; and that, as against him, it is a nullity.

Per Curiam. Judgment affirmed.

## SAMUEL P. JOHNSTON *vs.* JOSEPH LANCE.

If the truth of the charges made in a libel, when the libeller has been prosecuted for it, will justify him in bringing an action for malicious prosecution, the charges ought to be proved to be strictly true by plain and full evidence.

Where one repeats an oral slander and gives the name of his informant, he is justified or not, according to the *quo animo* the charge is repeated and propagated.

In the case of a written libel, the mention of the name of the author, or the general rumor, of the libellous matter, will not excuse or justify the publication of such, even if the author or the rumor be distinctly proved.

The cases of *Hampton* v. *Wilson*, 4 Dev. 468, *McBrayer* v. *Hill*, 4 Ired. 146, and *State* v. *White*, 7 Ired. 180, cited and approved.

Appeal from the Superior Court of Law of Buncombe County, at the Special Term in June 1846, his Honor Judge BATTLE presiding.

This was an action on the case for a malicious prosecution. Pleas, general issue and justification. The plaintiff, in support of his action, introduced a State's Warrant, taken out against him by the defendant, and charging him with publishing a libel against the defendant, under which he was arrested and detained in custody about thirty-five hours, when he was taken before a magistrate, and, upon examination, was discharged. The defendant then in his defence proved, that the plaintiff published the paper writing, of which the following is a copy, "notice. To all not only the people of this State and County but to the whole Union if there is any yet in the dark, though I dont even think that there is any in these regions but nows as much about the gentleman as I do but for the benefit of others I hereby certify that one Jo Lance one of the beings of that State and County is a lyer and if the boy wants it I can do as I have done before I can prove it I dont apprehend that this will hurt

the gentleman's feelings for I heard Mr. W. H. F. tell him to his face that he had swore a lye and stole a hog and he could prove it from which the said Lance had like to rode Ball to death for a writ which he obtained and Mr. W. H. F. was bound to cort and I am told since that one glass of apple jack cured the wound and I recon that it is true for I saw the gentlemen drink friends so if this should tech the feelings and the gentlemen and he wants to reach me he can ride ball again and look below and find my name S. P. Johnston Look for a shoat from Bets at a broken leg but dont forget to mind seling milk and watter to J. R. S. at ten cents per lb."

The plaintiff then undertook to prove that the charges contained in the alleged libel were true; and for this purpose he called upon several witnesses, who testified that the defendant had the character of being a common liar. He then called William H. Fulton (the person, whom he alleged to be alluded to in the paper writing under the initials W. H. F.) who testified that he had, sometime before the publication of the paper, charged the defendant to his face with having sworn to a lie and stolen a hog, that the defendant had sued him therefor, and that, while the suit was pending, he and the defendant had agreed to settle the matter and be friends, and that they, at the instance of a mutual friend, took a drink together and parted, as he supposed, friendly; but the defendant afterwards refused to stand to the agreement; but how their suit was ultimately disposed of was not shewn. The plaintiff then called upon Mr. Shuford (whom he alleged was alluded to also in the publication by the initials of his name,) who testified, that the defendant brought some butter to his Store for sale, that he proposed to buy it, and, in looking at it with that view, found that it had a large quantity of milk and water in it. He however told the defendant he would take it, after he could have the milk and water separated from the butter, to which the defendant assented, and he then

bought upon those terms. The plaintiff insisted, that he had proved the truth of all the charges contained in the alleged libel; that the defendant, therefore, had no probable cause for the prosecution, that it was malicious, and he had a right of action against him.

The defendant contended, that the plaintiff was bound to prove, not only that he, the defendant, had been charged with swearing to a lie and with stealing a hog, but that he was actually guilty of those offences. He contended further, that the evidence introduced, if believed, did not establish the charges of his having compromised his suit with Fulton over a drink of liquor, and of having sold milk and water for butter.

The Court instructed the jury, that it was not necessary for the plaintiff to prove the truth of the charges, that the defendant had sworn to a lie and stolen a hog, but only that he had been charged to his face with those offences by W. H. F. and that, if the plaintiff's testimony were believed, he had proved substantially all the allegations contained in his publication. The jury returned a verdict for the plaintiff, upon which he had a judgment, and the defendant appealed.

*Edney*, for the plaintiff.
*N. W. Woodfin*, for the defendant.

Ruffin, C. J. The publication, made by the plaintiff concerning the defendant, is so obviously and grossly defamatory, that it must be taken upon its face to have been made with the intent to injure the character of the defendant, and, therefore, that it was, in a legal sense, malicious and libellous. The defendant had unquestionably, then, probable cause for instituting a prosecution for the libel—at least, *prima facie*. We are not prepared to say at present, that even proof in this action of the defendant's guilt of the matters, charged on him in the libel, would deprive him of the bar to the action arising

out of the probable cause the defendant had for supposing the plaintiff liable to indictment for that malicious publication. For, although when indicted, the plaintiff could have given the truth of his charges in evidence, and thereupon would have been entitled to an acquittal, yet he was *prima facie* guilty of libelling a citizen, and therefore might justly, perhaps, be called on for his proof, and ought not to have his action against one for so doing. We entertain serious doubts, whether the statute, which allows the truth to be given in evidence upon an indictment for a libel, can be carried further and to the extent of giving to the defendant in the indictment an action against the prosecutor for malicious prosecution, because the libel was true: for his acquittal arises upon evidence, which he is compelled to give on his part, in order to extricate himself from a state of probable and apparent guilt. And it would seem to be almost impossible to persuade a jury, that a person, libelled as this defendant was, preferred a prosecution against his defamer from motives of malice merely, instead of a desire that the person should be punished for the malicious publication complained of by him; and, without such malice by the prosecutor, this action ought not to have been sustained, even though there had not been probable cause. But the point was not made in this case, nor argued before us, nor, indeed, has it been much considered by us; and, as we think it deserves to be well discussed and considered before a decision of it either way, we do not think proper now to lay down any rule in respect to it, since, in our opinion, this case may be determined and a *venire de novo* must be awarded upon other points, on which there is no doubt.

If the truth of the charges made in a libel will not only justify the publication, when the author is tried for it, but also will give him an action for malicious prosecution, it is plain, that, to have this last effect, the charges ought to be proved to be strictly true, by plain and

full evidence. This plaintiff avowed in this publication itself the purpose of provoking the defendant to sue or prosecute him for it. He expressly invited the very proceeding of which he now complains, as, indeed, every libeller impliedly does. Then, he ought to be prepared to make good every word he thus utters to gratify his malevolence, and is entitled to no charitable construction of his language, nor liberal extension of his evidence beyond its necessary import. For a libeller is not a public benefactor, but is among the most licentious, malignant and mischievous of our race, and therefore can ask no indulgence, to which he is not entitled *stricti juris*.

The plaintiff's proof in this case not only did not sustain his charges strictly, nor even substantially, but, in the opinion of the Court, signally failed in respect to each and every one of them.

The first is: "I hereby certify that Jo: Lance is a liar. And if the boy wants it, I can do as I have done before—I can prove it." This is a direct and positive averment that Lance *is* a liar; and it is perfectly plain, that its truth is not sustained by evidence, that he had the general character of being a liar. If Lance had brought an action for the libel, a plea of such a general reputation would not justify the charge, though the fact might mitigate the damages: for the charge affirms as a positive fact, that he was guilty of the despicable vice of lying, while the proof is, *not* of *the fact*, but that people suppose him to be thus guilty. If one accuse another of stealing a horse, the plea of a common rumour, that the person is a horse-thief, will not amount to a justification in an action for the libel, more than evidence of such a rumour would establish the party's guilt upon an indictment for the theft. Reputation is in no case evidence that one is guilty of a specific offence; and that is the charge here.

The next imputation on the defendant is: "I heard Mr. W. H. F. tell him to his face, that he had sworn a

lie, and stole a hog, and he could prove it: for which the said Lance had like to have rode Ball to death for a writ. which he obtained, and Mr. W. H. F. was bound to Cort; and I was told since, that one glass of apple-jack cured the wound, and I reckon it was true, for I saw the gentlemen drink friends." Here are two libellous imputations against the defendant. The one, that the plaintiff had heard some person not named, but designated only by the initials, "W. H. F." accuse the defendant to his face of the crimes of perjury and the other that the defendant either sued or prosecuted "W. H. F." therefor, and then, as the plaintiff had heard from some one not named, the defendant had compounded the case over a glass of liquor without the accusation being retracted or compensated in any other way. Neither of those charges is sustained by the evidence, as we apprehend. The latter, plainly, was not. According to the libel, a glass of apple-jack cured the wound, so that the defendant was pacified by a drink. But Fulton's testimony did not prove any such thing. He says, that he and the defendant "agreed to settle the matter and be friends, and that, at the instance of mutual friends, they took a drink together and parted friendly, but that afterwards the defendant refused to stand to the agreement." Now, it is plain that, according to this testimony, the liquor did not cure the wound, and induce the defendant to dismiss his suit against Fulton. In fact it was not compounded at all, and, as far as appears, is now pending. Fulton says, "they agreed to settle the matter;" but upon what terms was not specified, or, at least, he mentions none. The natural inference is, that as the parties were to be "friends," the settlement was expected by the defendant to be made on such terms as became that relation—which, certainly, could not be, that he should dismiss his suit and pay the costs, and lie quietly down under the unretracted charge by his "friend" of perjury and theft. That could

be no "settlement" of the matter," but only a downright abandonment of all right to redress. That was not what Lance intended, and hence he did not and would not "settle" the suit, because, when the parties came to talk about the terms, they could not agree. The drink of spirits was therefore not the price of the slander upon him, and of his suit; but it turned out, that while the parties were in treaty for a compromise (which was never closed) they drank together, at the instance of friends who wished to promote peace between them. That transaction was, therefore, grossly perverted in the plaintiff's publication, according to his own evidence in support of it.

The other and more serious branch of the charge under consideration was equally destitute of support in the evidence. That consisted of the testimony of William H. Fulton, that, before the publication, he had charged the defendant to his face with having sworn to a lie and stolen a hog; and that the defendant sued him for it, and that thereafter the transactions with a view to a compromise occurred, which have been already stated. The deficiency in the proof is, that there is none whatever to the truth of the charges thus made by Fulton on Lance, that is to say, that, in fact, the latter did swear to a lie and did steal a hog, as we unanimously hold, there ought to have been. It has long been settled, that, even in cases of oral charges, the repeater, who does not at the same time name his author, takes the assertion upon himself and can only justify by proving the truth of the accusation. *Earl of Northampton's case*, 12 Rep. 132. Within that rule the plaintiff was bound to give evidence of the guilt of the defendant; for he does not mention the name of the person from whom he heard the charge, but designates him by initial letters only as "Mr. W. H. F." That did not give the defendant a certain cause of action against any other person in particular, and therefore, according to the case cited, an action would lie against the repeater

himself, unless he established the truth of the charge. But, if it were admitted, that "W. H. F." might, under the circumstances, be understood to be "William H. Fulton," yet the plaintiff would not be exonerated from the burden of proving the charge to be true. Where the slander is oral, and the repeater gives the name of the person from whom he heard it, the Court strongly intimated, the opinion in *Hampton* v. *Wilson*, 4 Dev. 468, and *McBryer* v. *Hill*, 4 Ire. 136, that the justification depended upon the *quo animo* the charge is repeated and propagated; and with that we are upon longer reflection entirely satisfied. For, if one circulates a slander with the design to cause it *to be believed* either upon his own credit and character or those of his author, that the person implicated is guilty of the fact charged, he really and truly, though covertly, endorses the charge and should bear the burden of having affirmed its truth. He meant, when he repeated the slander, that *thereby* the party's character should be injured. How? By inducing the world to think, that as such a man made the charge, and he, the repeater, gives it currency, it is true. That is the substance of what one intends and does, who propagates a slander *malo animo*; that is, with the purpose of detracting from his neighbor's character and standing in society; and therefore he ought to be held bound to prove the charge as he meant it should be understood. If that be so where the slander is oral, much more is it true, when it is printed or written; because the ill feeling and evil purpose of the propagator are more distinctly exhibited, and the injury done to the other party is more extensive and durable. The cases of *Lewis* v. *Walton*, and *Dale* v. *Lyon*, which were cited in *Hampton* v. *Wilson*, hold clearly, that a justification by giving the author is inadmissible altogether in actions for libels; and the familiar case of the liability of the printer of a newspaper for a publication therein of another person, under the author's name, is conclusive upon the point. There have also

been several cases since, both in England and this country, to the same effect. The present is the first case in this State, in which the point has arisen directly. But the conclusion necessarily follows from what has been held and said in the other cases before mentioned, and, particularly, that of *State* v. *White*, at the recent June Term of the Court at Raleigh, and not yet reported. In that case we held, that upon an indictment for a libel, the publication of a charge as a rumor was not justified by proof of the rumor, but required proof of the charge itself; and it was distinctly stated by my brother NASH, that, even if the author had been given, it would have made no difference, unless the defendant had shewn that he made the publication for a good end and without the evil one of defaming the prosecutor. Now, this plaintiff did not ask to be excused upon a good motive, that actuated him, but insisted only, that upon strict law he was justified by the truth. The truth of what, is it to be understood? He says, it is, that Fulton told Lance, he was forsworn and a thief. But was that all he meant, the readers of his piece to believe from it? Certainly not. Courts must read like the world does, and understand charges in the same sense in which other men do. No person can read this piece without seeing, that the plaintiff intended to injure the defendant's character as far as he could, and to have it believed, that he was guilty. It is to that end, that he says he heard the defendant charged with those crimes to his face, and that, after suing for the scandal, the defendant gave up the suit for the pitiful pretence of a drink of friendship, without any reparation by damages or acknowledgment of injury and pardon asked. Is it not clear, the plaintiff supposed and intended that the world would infer from such conduct of the defendant, that he had no character to vindicate and was afraid to bring his suit to trial from a consciousness of guilt; in fine, that the public would infer that the defendant was really guilty? He ought therefore to make good the

charge in the sense in which he intended to make it; which is, by proving the acts charged on the defendant.

The last charge is the direct one of "selling milk and water at 10 cents per pound;" and the evidence was an offer to sell butter, from which the milk and water had not been perfectly separated. Upon the most favorable presumptions for libellers—to which, indeed, they are not entitled—evidence of an intention to do an act does not prove a charge of the act done. Besides a man may innocently take a parcel of butter to market, which may not have been properly beaten up by the dairy woman, while few would suppose, that he could fairly sell milk and water at the price stated. Things are not to be taken in their worst sense against a person accused, but his innocence rather is to be assumed until the contrary be shewn; and libellers ought not to be encouraged to misconstrue and misrepresent the conduct of others by allowing them boldly to make specific charges, and then support them by loose evidence of something that was not entirely creditable to the other party. They ought to confine themselves in the gratification of their bad passions, to making such charges only, as they can fully and strictly prove.

Upon the whole, it appears from its contents, that this was a publication of as pure spite, as one almost ever sees; and, as we think, it was not supported by proof in any part of its substance; and, consequently, this action was groundless.

Per Curiam. Judgment reversed and *venire de novo*.

## HENDERSON G. WEAVER vs. JAMES B. UPTON.

Where two partners entered into a covenant that one of them should receive a salary for managing the business; *Held*, that this salary must be paid out of the partnership funds.

Appeal from the Superior Court of Law of Burke County, at the Spring Term 1846, his Honor Judge PEARSON presiding.

This was an action of covenant; the breach assigned was the non-payment of $450.

The execution of the covenant was not denied and it was read in evidence. The defendant's counsel moved to non-suit the plaintiff, upon the ground that the covenant amounted to an article of copartnership, and that the $450, for the non-payment of which, the covenant was alleged to have been broken, was to be allowed out of the funds of the copartnership, and did not constitute such a demand as would support this action. The question was reserved. It was proven that the plaintiff had ceased to act as manager, some short time before the end of the year, by mutual consent; in consequence of which the jury, in assessing the damages upon the breach assigned, made a deduction from the $450 which was the amount of damages claimed. There was a verdict for the plaintiff subject to be set aside and a non-suit to be entered upon the question reserved.

The Court being of opinion with the defendant upon the question reserved, the verdict was set aside and a non-suit entered, from which the plaintiff appealed.

The following is the covenant referred to:

"STATE OF NORTH CAROLINA—*Burke County*—December 27th, 1841. James B. Upton and H. G. Weaver hereby enter into an article of agreement for the next year (1842.) James B. Upton, of the first part, has the privilege of working twenty hands on "the McKenzie mine," paying

the fifth part of the gold that is made, for toll. H. G. Weaver, of the second part, has the privilege of putting in four hands at valuation, bearing a proportionable part of the expense attached thereto; the said Upton, of the first part, bargains and agrees to give me the said Weaver of the second part four hundred and fifty dollars to manage the business, which I agree to manage according to the best of my judgment, making true returns of all the gold made by me; the mine is to be worked according to the lease. We make our seals," &c. Signed and sealed by James B. Upton and H. G. Weaver.

*Gaither*, for the plaintiff.
*N. W. Woodfin*, for the defendant.

DANIEL, J. Weaver and Upton, on the 16th of December, 1840, leased of one McKenzie a tract of land for three years to mine for gold; the rent was to be one sixth part of the gold, that should be obtained by the lessees. On the 27th of December, 1841, the lessees entered into the agreement under their seals, mentioned in the case. Upton was to work twenty hands, and Weaver four hands, "bearing a proportionable part of the expense attached thereto. The said Upton, of the first part, bargains and agrees to give me, the said Weaver, of the second part, four hundred and fifty dollars to manage the business, which I agree to manage according to the best of my judgment." It seems to us, that the agreement was one of partnership; and the law being well settled, that the acting and business partner is never entitled to claim pay of the firm for his services, unless he stipulates for it in the articles of copartnership or otherwise; the parties therefore agreed, that Weaver should manage the business, and Upton, the other partner, agreed to give him $450 "to manage the business." Weaver was to bear his proportion of the expense of managing and working the mine. The salary of the superintendent was a part of the expense of the firm. And the firm ought, according to the true construction of the articles, to bear this expense in proportion to the number of hands each partner worked in the mine. The words "The said Upton bar-

gains and agrees to give me the said Weaver $450 to manage the business," only denoted the assent of Upton, that Weaver, although a partner, should be paid for his services $450. The parties were stipulating concerning the partnership business, and the terms on which it was to be carried on; and among others, that Upton bargained and agreed to let Weaver have $450 for his services that year. It seems to us, that it would be against justice and right, to construe the covenant to be an agreement by Upton, that he would pay that sum out of his own pocket. We think that it was an item in the expense account of the firm and that the firm should pay it.

PER CURIAM. Judgment affirmed.

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## WILIE GAITHER *vs.* ELIJAH TEAGUE.

The following instrument was signed, sealed and delivered. "Know all men by these presents, that I, Edward Teague, have this day bargained for a sorrel filly with W. Gaither, which filly I want to stand as security until I pay him for her. I also promise to take good care of her. Witness my hand and seal, this 5th of October, 1838." *Held*, that, upon the face of the paper, it was doubtful, whether it was intended as a mortgage or a conditional sale, and that it was properly left to the jury to determine its character from the accompanying circumstances.

Appeal from the Superior Court of Law of Caldwell County, at the Spring Term, 1847, his Honor Judge SETTLE presiding.

This was trover for a filly, and the plea, not guilty. It was admitted on the trial, that the filly had formerly belonged to the plaintiff; and the controversy turned upon the question, whether he had sold her and parted from the title to one Edward Teague and then taken a mortgage of the filly from the said Edward, or whether he had made only a conditional sale to Teague, keeping the title in himself. To support the issue on his part, the plaintiff gave in evidence an instrument in the following words:

"Know all men by these presents, that I, Edward Teague, have this day bargained for a sorrel filly with W. Gaither; which filly I want to stand as security until I pay him for her. I also promise to take good care of her. Witness my hand and seal, this 5th of October, 1836. Edward Teague, (Seal.)"

The plaintiff further gave evidence, that the price agreed on for the filly was $30, and that Teague then gave him his bond therefor, and that the same still remains unpaid.

The plaintiff further to support the issue on his part, called as a witness one W. B. Nicholls, who is the subscribing witness to the said instrument and bond; and he deposed, that they were executed at the same time, and before the filly was delivered by Gaither to Teague, and that Gaither required Teague to give him the said instruments, before he would let him have the filly, and that, immediately after receiving them, he delivered the filly to Teague, who then had her shod at Gaither's shop and took her home. The plaintiff further gave evidence, that, on the 5th of October, 1836, all the property of Edward Teague was levied on by constables on executions against him, when he got home; and that he then said, and, also, frequently afterwards, that Gaither held the property in the filly, until she should be paid for. The plaintiff further gave evidence, that the present defendant, Elijah Teague, some months after the contract,

informed the plaintiff that he had traded with Edward Teague for the filly, and was to pay the bond to the plaintiff, and that, afterwards, the defendant had the filly and sold her as his own property.

The defendant on his part, then offered the evidence of Edward Teague, who deposed, that he bargained for the filly absolutely with the plaintiff, and gave his bond for the price, and that she was delivered to him; that he had her shod at Gaither's shop, and, after that was done, he requested Gaither to take a lien on her, stating to him, that there were debts against him, for which she might, otherwise, be sold; and that Gaither replied, that he did not want it, himself, to secure the money, but that, to accommodate him, Teague, he would take the lien; and that, thereupon, the written instrument before set forth was executed and given to Gaither, who told the witness, that he might dispose of the filly, as he pleased; and that, five or six months afterwards, he did sell her to the defendant for $40, of which the defendant paid him $10, and the remaining $30 he agreed to pay in discharge of the bond to the plaintiff for the price of the mare. He further deposed, that, afterwards, it was agreed between the witness, the plaintiff, and the defendant, that the defendant should pay the $30 on other debts, which the witness owed the plaintiff, and he did so.

The defendant, further to support the issue on his part, called several witnesses, who, or some of them, deposed, that the plaintiff had said, that he kept a mortgage on the filly at Teague's request, to keep off the constables, and that the witness, Nicholls, had said, that, after the trade was finished, Teague requested Gaither to take a lien, to keep off the officers; that the defendant delivered to the plaintiff 470 pounds of iron at 6 1-4 cents per lb. and requested it to be applied to the debt for the filly and offered to pay the residue in money; but that the plaintiff wished to credit the payment on a note given by the two Teagues, to one Austin, that was payable in iron,

and then belonged to the plaintiff, and that the defendant agreed thereto, saying that he did not care on which debt the credit was entered, as he had to pay but $30 for his brother.

The plaintiff then gave evidence, that, a short time before the iron was delivered, the defendant asked the plaintiff, if he would receive iron for the filly debt, and the plaintiff told him, he would not, as that debt was payable in money; but that he would receive it on the Austin note, which had been given by both the Teagues and was payable in iron: and that when the defendant afterwards brought the iron, he again asked the plaintiff to apply it to the filly debt, but the plaintiff replied as before, and thereupon the defendant applied it to the Austin debt, saying that it was immaterial, as he was bound for both debts and expected to pay them; and the defendant took up the Austin note.

It was, therefore, insisted by the counsel for the defendant, that the instrument, taken from Edward Teague by the plaintiff, was a mortgage, and that it was void, for want of registration, as against the defendant, a purchaser; and also, that if, in law, the contract were held to be a conditional sale, the condition had been performed by the payment of the iron; and, also, that the plaintiff had abandoned his title, by consenting to the sale to the defendant; and the counsel moved the Court so to instruct the jury. The counsel for the defendant moved the Court also to direct the jury, that, if they believed the testimony of Edward Teague, they should find for the defendant.

The Court charged the jury, that the instrument could not be held to be a mortgage upon its face merely; but that, if they should believe, that the plaintiff transferred the property in the filly to Edward Teague, and that they afterwards came to an agreement to secure the plaintiff in the price and for that purpose made this instrument, then they ought to regard it in the light of a mortgage

and it would be void as against the defendant. The Court further instructed the jury, if they believed the plaintiff abandoned or relinquished his title, by consenting to the sale to the defendant, or allowing Edward Teague to dispose of the filly as he pleased; or, if they believed that the plaintiff and Edward Teague, at the time of the contract, intended to deceive or defraud Edward Teague's creditors, or purchasers from him; or if they believed the evidence of Edward Teague; or, if they believed the plaintiff had received payment for the price of the filly in iron or otherwise, that then they ought to find for thedefendant.

From a verdict and judgment for the plaintiff, the defendant appealed.

*Gaither*, for the plaintiff.
*Guion*, for the defendant.

Ruffin, C. J. The presiding Judge gave every instruction the defendant's counsel asked for, (and even went beyond the prayer in some respects,) excepting only in not holding, that the instrument, given in evidence by the plaintiff, was a mortgage. Under the circumstances of the case, this Court is of opinion, that his Honor was right in so holding, and in leaving it to the jury to determine its character, as they might find the facts, whether it was given at the instance of the plaintiff or Teague, or before or after the sale had been completed by a contract and delivery. Upon its face the instrument is equivocal. It is not, indeed, a paper, given by the seller to the buyer, and purporting in itself to be a sale on certain conditions; as the defendant's counsel says it ought naturally to have been, if that was the nature of the contract. But, although the paper comes from the other side, and might, therefore, raise a presumption, that the title had before vested in Teague, and that the purpose was to give a security from him for the price, yet that consequence does

not necessarily follow, either from the terms of the instrument, or the reasons on which it may have been given. It has no terms of conveyance from Teague, as the existing owner, to the creditor, as a mortgage ought. It only says, that Teague had "bargained" for a sorrell filly with Gaither, which may mean an executory, as well as an executed, contract of purchase; and, in common parlance, the word is most commonly and properly used in the former sense. Then, there follows the covenant, that Teague will take good care of the filly, which is most unusual and inappropriate in a mortgage, properly speaking. And when it is asked, why the paper is taken from Teague, instead of being given by the vendor, the answer at once suggests itself, that, from the nature of the article, the title would apparently vest in the vendee by the contract or delivery, and, therefore, that no instrument, made by the vendor only and delivered to the vendee, would be available to the former to shew the terms of the contract; but that, in order to shew that, it was necessary that the instrument should be given by Teague, saying that the title did not then vest in him, notwithstanding his bargain and possession, but remained with Gaither, until he should be paid the purchase money. According to the terms of the instrument and the nature of the property, therefore, it seems to the Court, that, though dubious, it should be held, that it was intended, rather as evidence of a conditional sale, than to constitute a mortgage. Under those circumstances, it aids very materially in ascertaining its character, when the period at which it was given and the declared purpose of giving it are known. If it were true, that it was given, after an absolute sale and delivery by the plaintiff to Teague, and at the suggestion of the latter, as stated by him, it could be nothing else but a mortgage or a security in the nature of one; and the equivocal language would have a meaning impressed on it, which could not be mistaken. But, upon that point, the testimony of that person and

that of the subscribing witness were irreconcileably at issue; and the Court left their credit to the jury, and they found that Teague's account was not true and that of the other was. That renders it as plain on the other side, that the instrument was not intended as a mortgage, because it was given by Teague before any property in the filly vested or could have vested in him, and, consequently, that it was not a conveyance from him, but a declaration, simply, of the terms, on which his purchase was to become absolute.

PER CURIAM. Judgment affirmed.

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JACOB HOYLE *vs.* JOHN A. WILSON.

A report of a processioner is radically defective, which does not state, with precision, the claims of the respective parties, so as to shew what lines were disputed or how far they were disputed.

The important and conclusive effect given by the statute in relation to processioning, whereby two inquisitions of the processioner vest an absolute title, requires the Court to view the proceedings with a vigilant eye, that no injury may accrue from tolerating an undue laxity in the proceedings.

The cases of *Carpenter* v. *Whitworth*, 3 Ired. 204 and *Mathews* v. *Mathews*, 4 Ired. 155, cited and approved.

Appeal from the Superior Court of Law of Cleaveland County, at the Spring Term, 1847, his Honor Judge DICK presiding.

This is a proceeding under the act for processioning land. The report of the processioner states, "that I, at the instance of Jacob Hoyle, attended on the premises on Beaver-dam branch of Knob Creek, for the purpose of processioning the land of said Hoyle, and, it appearing that said Hoyle had given due notice to the adjoining proprietors, I proceeded as follows, to-wit: Commencing at a spanish oak on south side of said branch, and, I was proceeding to procession, when I was forbid by John A. Wilson to proceed. Then I removed to the next station, and beginning at a black oak on the north bank of the branch, and running thence south eighty-seven degrees east with the meanders of the branch thirty-eight poles to a maple, thence south, &c." setting forth several lines by course, distance and corners, until he comes to a black oak, and then stating, "thence south sixty-seven degrees east sixteen poles to a maple, near said Hoyle's fence. Here I was proceeding to procession the line from this last station to the next, when I was forbid by said John A. Wilson to proceed further in running and marking the said line, and thereupon I desisted, and make this my report."

The County Court, thereupon, appointed five freeholders "to appear with the processioner on the disputed lines between Jacob Hoyle and John A. Wilson, and designate the lines according to law, and report, &c."

The report of the processioner and freeholders states, that, after being duly sworn, they proceeded to establish the line in dispute between John A. Wilson and Jacob Hoyle, as follows, that is to say, running in favor of Jacob Hoyle: Beginning at a maple, where John A. Wilson stopped the processioning, and run south thirty-five west seventy poles to a stake and pointers on a line of James Wilson's old three hundred acre grant, and thence with said line north eighty-six west, eighty-three poles to a stake in John A. Wilson's field; thence south eighteen west, forty-three poles to a spanish oak; thence south

fifty-four east, one hundred and nineteen poles to a black oak, where the former begun; and we have caused the said line to be run, marked and processioned." The counsel for Wilson moved the County Court to quash the reports, but the Court refused, and ordered the proceedings to be recorded, and gave judgment against Wilson for the costs, and he appealed.

In the Superior Court the judgment was reversed with costs, and the report of the freeholders set aside, and the original report of the processioner quashed, for insufficiency, and therefrom Hoyle appealed to the Supreme Court.

No counsel for the plaintiff.
*Guion*, for the defendant.

Ruffin, C. J. The report of the processioner is radically defective, in not stating with precision the claims of the respective parties, so as to shew what lines were disputed or how far they were disputed. In every legal controversy there must be an identity given to the subject, and an issue between the parties. In actions at common law, in which the question of boundary is triable, the land is described and identified in the declaration or new assignment, and the issues arise on the pleas and rejoinder; and thus it appears upon the record what the controversy is. There is the same necessity for precision in proceedings of the kind under consideration, since it cannot otherwise be known to what subject the controversy relates, nor on what point it is to turn; and the Court cannot see what decision should be given, nor to whom costs should be awarded. Indeed, the very important and conclusive effect, given by the statute to these inquisitions, whereby two of them vest an absolute title, requires the Court to exercise the utmost vigilance to prevent surprize and injury to the true owners of land, by tolerating any undue laxity in the proceedings. As has just been said, it is

necessary that the parties should be brought to a point in this proceeding as in actions; and the Legislature intended they should. But, unfortunately, instead of leaving the parties to the regular modes of pleading, whereby the issues may be joined technically and distinctly, they are delivered into the hands of a processioner, whose report is to serve the purposes of declaration and plea, and all the subsequent steps necessary to come to an issue. It is not surprising, then, that the requisite precision is not observed, and so few proceedings of the kind can be sustained, though the Court has taken pains heretofore to explain themselves upon this subject as clearly as they could. *Carpenter* v. *Whitworth*, 3 Ire. 204, *Mathews* v. *Mathews*, 4 Ired. 155.

This report points out no specific dispute, but leaves every thing at large. It begins by saying, that the processioner "went upon the premises" on a certain branch of a creek, for the purpose of processioning "the land of Jacob Hoyle." But it gives no description whatever of the land thus claimed by Hoyle, so as to shew that the subsequent dispute was touching it. Then it proceeds to say, that the processioner was about to run some line from a spanish oak on the south side of the branch, and that he was forbidden by Wilson, and that he went to the next station, beginning at a black oak and run thence. On the line, then, from the spanish oak we must understand that there was "a dispute," and that there was none on the line from the black oak; because the former Wilson would not let him run and to running the latter he made no objection. How that could be it is not easy to understand, as the report calls the black oak "the next station," as we suppose in Hoyle's deed or claim; and therefore it would seem, the line must be a straight one from the spanish to the black oak. Certainly, however, the report professes to state a dispute as to a line from the spanish oak. But what it was no one can possibly divine, for it does not describe any course or distance, or

*terminus* for the line claimed by Hoyle from the spanish oak, unless indeed the black oak be the *terminus*, and in that case there is the absurdity just mentioned. But, after going through six or eight lines after leaving the black oak, the processioner got to a maple corner, and was there also stopped by Wilson, although Hoyle wished him to run further, though in what direction and how far, or how many lines is not stated. It is obvious, therefore, that no particular dispute—no precise issue—upon any part of the boundary is here reported; and a report of the freeholders of particular lines, either from the maple or the spanish oak, may not conform to the claim of either party, although their province is "to go on *the* lines disputed" and "establish *such* disputed lines." And thus it turned out, that in this case the freeholders in part did. For, beginning at the maple, where the processioner was stopped, they ran three lines, described by course, distance and *termini*, to the spanish oak, at which the processioner wished to begin, and then again, a line south 54 east 119 poles from the spanish to the black oak, where the processioner actually began his first survey. Therefore instead of deciding disputes raised in the report and establishing lines therein stated to be claimed by one party or the other, the freeholders have established lines, which, for ought that we see, neither party alleged to be his. In fine the processioner reported no issue between the parties, and there was, in fact, nothing definite to be tried; and, therefore, all the proceedings were properly quashed.

PER CURIAM. Judgment affirmed.

## DEN ON DEMISE OF HUGH M. LEE *vs.* MARY FLANNAGAN.

An indulgence for a year, upon obtaining a real security for an existing debt, which is necessarily made public by registration, is not so unreasonable as to raise a legal presumption of an intent to hinder a creditor by the security.

On a question of fraud as to a deed of trust, &c., it is a proper subject of inquiry by the jury, whether the sale was to be in convenient time under all the circumstances of the parties.

Where a deed in favor of one creditor is made *for the purpose* of defeating another creditor, it is fraudulent; but it is not so when the loss of the latter is *merely a consequence* of the preference given to a just debt.

It would seem that a mortgage of land for a just debt cannot be a fraud upon another creditor, (since our Act of 1812,) because it cannot obstruct his remedy, by a sale of all that under any circumstances ought to be sold, namely, the debtor's whole interest in the premises.

In an action of ejectment, when the tenant in possession makes default, and another is let in, by consent, to defend, upon an admission of actual possession in that person, it must be understood that it was the object of those parties to try the title between themselves at once, without the delay or expense of a new suit.

The cases of *Moore* v. *Collins*, 3 Dev. 136, *Hafner* v. *Irwin*, 1 Ired. 490, *Davis* v. *Evans*, 5 Ired. 525, and *Wise* v. *Wheeler*, 6 Ired. 196, cited and approved.

Appeal from the Superior Court of Law of Mecklenburg County, at a Special Term in November 1846, his Honor Judge PEARSON presiding.

This was an action of ejectment. The declaration was served on David G. Flannagan, who was then in possession. He did not appear to the action; and, by consent of the plaintiff, Mary Flannagan was made a defendant in his stead, and admitted herself to be in possession, and entered into the common rule, and pleaded, not guilty.

Both parties claim under David G. Flannagan as follows. In October 1836, Lee, the lessor of the plaintiff, instituted two actions of ejectment for other land against the said David G., and also an action of slander. In

February 1848, in the latter action, judgment was confessed by the defendant for the costs, which amounted to $478 17, and, upon a *fi. fa.* thereon, the premises were purchased by the lessor of the plaintiff in April 1843, and he took the sheriff's deed and brought this suit.

On the 29th of July, 1839, D. G. Flannagan conveyed the premises by a deed of trust to David Chambers in fee, to secure the payment of the sum of $460 75, recited therein to be due from Flannagan to Richard Peebles. In the deed it was provided, amongst other things, that, if Flannagan should fail to pay the debt to Peebles by the 1st of August, 1840, the trustee, upon request in writing from Peebles, should, after a specified notice, sell the premises to the highest bidder, and, out of the proceeds, discharge the debt; and that in the meantime Flannagan might remain in possession. In May, 1843, Chambers offered the land for sale and Peebles became the purchaser, and, after taking a deed from the trustee, he sold and conveyed to the defendant Mary.

In support of the issue on her part, the defendant also called David G. Flannagan as a witness. He deposed that the debt to Peebles, mentioned in the deed, was justly due. He stated that Lee's suits against him alarmed all his creditors, and caused them to take judgment against him; and that, before and during the summer of the year 1839, all his personal property, and also all his land, except the place on which he lived, (which is that now in controversy) were sold therefor; and that there remained unsatisfied several judgments, amounting in the whole to the sum of $460 75, of which one was in favor of Peebles. He further stated that the creditors in those judgments were about selling his home place also in July, 1839, and he then applied to Peebles, who was his neighbor and intimate friend, for indulgence, and also for assistance in paying his other judgments; and he told Peebles, that Lee's suits were all unjust, and he thought they would be decided in his favor, and, in that event, he believed

he would be able to pay all the debts without a sale of his home place. In order that he might have that opportunity, he requested Peebles to advance the money for all the other creditors, and offered to give him a deed of trust of the premises, as a security for the whole; and Peebles agreed thereto, and to indulge him until August 1840, and the deed was then executed. Upon his cross-examination, the witness was asked by the counsel for the plaintiff, whether, at the time he made the deed, Peebles did not agree to indulge him until the decision of the said suits; and he answered, that there was no such agreement.

Several instructions were moved for by the counsel for the plaintiff in the Court below, which will be found stated in the opinion delivered in this Court. Under the instructions of the Judge, the jury found a verdict for the defendant and the plaintiff appealed from the judgment thereon.

*Boyden* and *Iredell*, for the plaintiff.
*Alexander*, for the defendant.

Ruffin, C. J. The Counsel for the plaintiff first moved the Court to instruct the jury, that the deed was upon its face fraudulent in law, because a sale was not to take place for a year after its execution. The Court refused to give the instruction; and, instead thereof, told the jury, that the delay in the sale was a circumstance to be considered by them in determining, whether the deed was made upon an intent to defraud or hinder Lee of any recovery he might make, and that, if they found such intent, then the deed was void.

This Court concurs in the opinion given to the jury. An indulgence of a year, upon obtaining a real security for an existing debt, which is necessarily made public by registration, is not so unreasonable, as to raise a legal presumption of an intent to hinder a creditor by the se-

curity. This is more especially true, when the debt arose mostly upon a loan at the time from one intimate friend to another, with a view to relieve all his pressing necessities by discharging every demand ascertained at the time. The inference of an unfair purpose from such forbearance is so very slight, that it is scarcely possible that a jury should ever find it—especially as the resulting trust in the land, belonging to the debtor, is subject to execution in our law. But, at all events, the deed cannot for this cause be pronounced void, as a matter of law; and it was a proper subject of inquiry for the jury, whether the sale was to be in convenient time, under all the circumstances of the parties. *Moore* v. *Collins*, 4 Dev. 126.

The counsel for the plaintiff moved his Honor further to instruct the jury, that, if they believed the deed was made with the intent to defeat the recovery which Lee might effect, then the deed was fraudulent and void, notwithstanding the sum, secured therein to Peebles, was a true debt. The Court gave the instruction, as prayed for; but added, that the term "defeat" was to be taken in a qualified sense; for if the deed was made to secure a true debt, and another creditor lost his debt, merely by reason, that the debtor's property was not sufficient to pay both, and was all exhausted in satisfying the preferred creditors in that case the deed is not deemed fraudulent, because the law allows a debtor to prefer one creditor to another.

This Court approves also of this second instruction. The very power of an insolvent debtor to give preference implies, that the effect may be, that some of the creditors may lose their debts. Therefore, the distinction is, that when a deed in favor of one creditor is made *for the purpose* of defeating another creditor, it is fraudulent; but that it is not so, when the loss of the latter is *merely a consequence* of the preference given to a just debt. *Moore* v. *Collins*, and *Hafner* v. *Irwin*, 1 Ired. 490.

The counsel for the plaintiff asked for a further instruction to the jury, that, although a debtor may prefer one of his creditors, yet he must give an honest preference; and that the advantage, stipulated for the maker of this deed, that he should be indulged for twelve months, rendered it void. The Court, thereupon, informed the jury, that it was required, that the preference given should be an honest one; but that debtors had a right to obtain indulgence by giving a security on their property; and that, if they believed Flannagan's object, in making the deed for his land, was to obtain indulgence for a true debt, from July 1839, to August 1840, or even for a longer time, if the law suits, then hanging over him, should not then be decided, it did not render the deed void; for it was not a stipulation for such a benefit or advantage, as the law did not allow him to obtain, and worked no injustice to the plaintiffs in those suits.

This instruction, as prayed, ought to have been refused, upon the same reasons, on which the first was; for it is in substance but a repetition of it, though not precisely in the same terms. After a preliminary, undeniable proposition, that debtors can only make honest preferences, it asks the Court to lay down to the jury, in reference to this case, that the stipulation in the deed, that the debtor should be indulged for twelve months, made it void: which is just the same, as "that the deed was upon its face fraudulent in law, because a sale was not to take a place for a year." The Court might, therefore, have properly refused the instruction, and if that simply had been done, there would have been no necessity for further observations from this Court. But the Superior Court went beyond the refusal of the directions, which were asked for the plaintiff, and gave others; and that imposes upon us the duty of considering their correctness. It did not appear, indeed, that there was, as supposed, an agreement for forbearance, until the suits of Lee or either of them should be determined; for the only evidence, touching

that point, was the testimony of Flannagan, drawn out by the plaintiff, and that flatly denied any such agreement. For that reason, the judgment ought not to be reversed, although the instructions were deemed erroneous; since it was entirely irrelevant to the case before the Court, and could not therefore prejudice the plaintiff. We do not, however, see, that there is any doubt of the opinions given to the jury. But, while we say so, we cannot but express a regret, that, in the hurry of trials, the Court should sometimes go out of the points, arising on the proofs or raised by the counsel, and lay down abstract propositions; for it not unfrequently creates unnecessary difficulties, as it is not always as easy to perceive, as distinctly as here, that the propositions were altogether inapplicable. But to return to the instructions. We must say, that we concur in their legal correctness. If the deed had been made or used, to enable the debtor to get away from his creditor, or to give a false credit, or to keep off executions, or to secure any advantage to the maker as against his general creditors, it would vitiate it. But it would seem singular, than an evil intent should be imputed to an agreement, that a creditor should indulge his friend for a just debt, by not enforcing a registered security on land and on nothing else, until some other person should get a judgment against the debtor. Apparently, the preferred creditor could not better observe good faith against another creditor, than by saying to their common debtor, that, for himself, he would be willing to wait as long as the estate would suffice to pay the debt; but that, nevertheless, he could not agree to do so, longer than fairness and his duty to other creditors might render it proper, that he should raise his money and leave the residue of the estate open to the process of others. It was impossible that Lee could suffer any prejudice from this deed, until he should get his judgment. If, when he had done that, the deed was set up as an obstruction, so that he could not, immediately or in convenient time,

have execution of the debtor's interest in the lands, and the purchaser could not turn the debtor out of the enjoyment of the estate, then there would be cause to complain of the deed. But no such vice attaches to a mortgage of land, or a deed of trust, by which the creditor is at liberty and bound by agreement, to proceed to sell enough to pay his debt, as soon as another person, by getting a judgment, should have an interest in clearing the debtor's property from prior incumbrances. Indeed, since the Act of 1812, as was observed in *Davis* v. *Evans*, 5 Ire. 525, it is not easy to see, how a mortgage of land for a a true debt can be deemed covinous, upon the ground of forbearance merely, since a judgment creditor has the direct remedy of selling the equity of redemption, and that is the debtor's whole interest. If the day of forfeiture or day of sale be fixed in the deed, so remotely as to shew an intent to keep the security on foot, as a hindrance to the purchaser under execution in getting into possession, we will not say, that would not affect the conveyance; though, in the case just cited of *Davis* v. *Evans*, it was held that the purchaser could not be thus withstood, but might recover the possession in ejectment against the mortgagor in possession. But, however that may be, an agreement, that there should be a sale under the deed, as soon as the interest of a person then suing should require it, by his getting a judgment, is surely no reason for an allegation of fraud in the deed by that creditor; for the stipulation is actually for his benefit, and resulted from an unwillingness of the parties to the deed to cover the property from his execution, when he should get a judgment. Here, the debtor did not wish to sell his home, if he could help it, and he thought he could do so, in case he succeeded in the suits with Lee, as he believed he could pay the other demands by his labor. He expected, indeed, that the land must be sold, if Lee recovered. But, as that was uncertain, there was nothing improper, in getting the sale deferred until, by the

event, it could be seen, whether the satisfaction of his debts, including Lee's recovery, made it unavoidable. In the forbearance of a friend, to await that result, there is nothing immoral or illegal—provided only, that there was no intention to defeat the recovery, if one should be made. For a mortgagee is not obliged, in law or conscience, to coerce immediate payment, but only to do so, when it becomes injurious to another to keep the debt on foot in that form. As already remarked, it would seem, that a mortgage of land for a just debt cannot be a fraud upon another creditor, because it cannot obstruct his sale of all, that under any circumstances ought to be sold, namely, the debtor's whole interest in the premises. But, however that may be, certainly an agreement between the mortgagee and mortgagor, that the former shall raise his money out of the estate, whenever another creditor's interest may require it by his getting a judgment, cannot be injurious to such judgment creditor.

Lastly, the counsel for the plaintiff further prayed the Court to instruct the jury, that, if they were satisfied from the evidence and circumstances, that the understanding between Peebles and Flannagan was, that Peebles should indulge, until the law suits, then pending, should be determined, the omission to set the same out in the deed was a fraudulent concealment, which rendered the deed void. The Court instructed the jury, that it was not necessary to set forth in the deed that understanding, if the jury should believe, that in fact it existed.

It was enough to justify the refusal of this instruction, that there was no evidence of any such understanding. But we likewise think, that the omission supposed would not vitiate the deed; because it could not work any harm to the lessor of the plaintiff, and the operation of the deed, without that clause, is precisely the same, as if it had contained it. For the period, to which the sale was postponed by the terms of the deed, was the 1st of August, 1840, and that had passed two years and an half before

Lee got a judgment; and there appears no reason for supposing, that either Flannagan or Peebles expected, that the judgment could be got, if at all, before the expiration of the year.

In this Court it has been further objected, that this defence was not open to this defendant, because it would not have been to the defendant in the execution, upon whom the declaration was first served. But, we had occasion, in *Wise* v. *Wheeler*, 6 Ired. 106, to look into this question, and held, that when the tenant in possession makes default, and another is let in, by consent, to defend, upon admission of actual possession in that person, it must be understood, that it was the object of those parties to try the title between themselves at once, without the delay or expense of a new suit. That such was the intention in this case is certain, as the objection was not taken on the trial. For that reason, also, it cannot be sustained here.

PER CURIAM. Judgment affirmed.

JOHN CHANDLER *vs.* HENRY ROBISON.

Where a person charges another with perjury and is sued in an action for the defamation, it is not sufficient for him to prove simply, that what the plaintiff swore to was not true, but he must introduce evidence to convince the jury that the false oath was taken corruptly.

Appeal from the Superior Court of Law of Haywood County, at a Special Term, in June 1847, his Honor Judge BAILEY presiding.

This was an action for a verbal slander; the pleas, the general issue and justification. The charge was, that the defendant said, he had been informed, or a grand juror had informed him, that a true bill had been found against the plaintiff, for swearing to a lie, in a suit before a Justice of the Peace, between the plaintiff and one Hinson, on which trial the plaintiff was sworn under the book debt law, and that he would have his black jacket striped, or stript, at the next Court. To sustain his plea of justification, the defendant proved, that, some two or three years since, one Hinson owed the plaintiff eight gallons of brandy, which he was to have at 31 1-4 cents per gallon, *if he paid the cash.* Hinson did not comply with his contract, but, soon after, paid $1 12 1-2, for which the plaintiff gave credit on his account. The plaintiff and Hinson then came to another agreement. The plaintiff agreed, if Hinson would deliver to him two bushels and one half of wheat, before sowing time, he would take it in discharge of the balance of his account, the whole to be valued at seventy-five cents per bushel, and the brandy at thirty-seven and a half cents per gallon. After this, Hinson delivered one bushel of wheat which is credited in the plaintiff's account at 75 cents, making in the whole paid to the plaintiff $1 87 1-2; but Hinson failed to deliver the balance of the wheat, in time

according to the agreement. After this failure, the plaintiff warranted Hinson for four dollars, and, at the same time, informed the officer, that, after deducting the credit, there would be due on the account, one dollar and twelve and a half cents, or thereabouts. On the trial of the warrant, the plaintiff exhibited his account, in which he charged Hinson with eight gallons of brandy, at fifty cents per gallon, and credited him with one dollar, eighty-seven and a half cents. He swore, that, after giving all just credits, his account was just and true. The magistrate gave judgment for the plaintiff, and afterwards granted the defendant a new trial; and, on the second trial, the plaintiff admitted, that he had made the two contracts, as herein before stated, and again swore that his account was just. It was shewn, that, about the time of the second contract, the plaintiff had sold brandy for fifty cents per gallon.

The defendant's counsel moved the Court to charge the jury, that, if they believed the witnesses, the plaintiff had taken a false oath; and, further, that, as the plaintiff had, on the second settlement, given credit for $1 87 1-2 cents and had agreed to take two and a half bushels of wheat for the balance of his account, at 75 cents per bushel, rating his brandy at 37 1-2 cents per gallon, and as a bushel of wheat had been delivered in pursuance of his last agreement, the plaintiff was bound by it, as far as it was complied with, and could not look beyond it, and had no right to charge more than 37 1-2 cents per gallon for the brandy, not yet paid for. This instruction the Court refused to give; but charged the jury, that, although the plaintiff had entered into the contracts stated by the witnesses, and had agreed to take the wheat, and charge the brandy at the stipulated prices, yet if Hinson failed to comply with his part of the contract, the plaintiff had a right to be remitted to his original account, and to charge for the brandy whatever it was worth. His Honor further instructed the jury,

that, in order to sustain the defendant's plea of justification, they must be satisfied, that the plaintiff not only swore falsely, but that the oath taken by him before the magistrate was wilfully and corruptly false. If so, they would find a verdict for the defendant.

There was a verdict for the plaintiff, and a judgment accordingly, from which the defendant appealed.

*Francis*, and *J. W. Woodfin*, for the plaintiff.
*Edney*, for the defendant.

Nash, J. We agree with his Honor in refusing the instructions prayed for, and are not able to perceive any error in the charge. The first branch of the instruction required was palpably wrong. The Court was required to instruct the jury, that the testimony of the witnesses, if believed, shewed that the plaintiff had taken a false oath. That was not the charge made by the defendant against the plaintiff: but it was one of perjury. It was not sufficient, therefore, to the defendant's justification, that he should shew that the oath was false; but he must go farther, and shew that it was corruptly false. If this were not so, the condition of a witness would be truly perilous; the ignorant and the innocent would occupy the same ground with the corrupt. The most intelligent and upright are liable to be mistaken. It is not the falseness of the oath, alone, that constitutes the crime of perjury; but it is the corruptness of the heart in taking it. The Court, therefore, could not give the instruction as required, and the charge upon that part of the case is entirely correct. Neither was there any error in refusing the instruction asked for, as to the price of brandy sworn to. Two special contracts were entered into between the plaintiff and Hinson, relative to the brandy. By the first, Hinson was to have the brandy at 31 1-4 cents per gallon for cash. With this contract Hinson did not comply; and, after making a partial payment, it was mutually

abandoned, and a new one made, wherein both the price of the brandy and the mode of payment were changed. With this latter contract Hinson did not comply, and might by the plaintiff be considered as having abandoned it. And, in an action for the brandy, Hinson would not be allowed to set up, in his defence, a special contract, which he, himself, had broken. 2 *Smith's Lead. Ca.* 27. The plaintiff, then, was no further bound by it, than as it had been partially performed. Having been disappointed by Hinson in getting his seed wheat at the time he needed it, he was justified in considering the contract so far at an end, as to authorize him to charge for his brandy what it was worth. Such was the charge the jury received. But if, in strict law, the plaintiff was still bound by the contract, yet he might well believe he was remitted to his original account, upon the failure of Hinson to comply with it. And, if he did so believe, though the oath taken by him might have been false, it would not have been corruptly so, and would not support the defendant's plea; and the question of corruption was left to the jury.

PER CURIAM. Judgment affirmed.

## NANCY HARRISON *vs.* NATHANIEL HARRISON.

**On a petition by a wife for a divorce, the Court will not suffer an issue to be submitted to the jury in such general terms as these: "Did the defendant, before the petitioner left his house, offer such indignities to her person, as to render her condition intolerable and her life burthensome?" The petition must set forth the *facts*, the jury must pass upon those facts, and on their verdict the Court will determine, whether the facts found constitute or not a proper case for a divorce.**

Appeal from the Superior Court of Law of Haywood County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

This was a petition by the wife for a divorce a *mensa et thoro*, and for alimony. It was filed on the 21st of October, 1842; and it states, that the parties married in 1839, and that the petitioner endeavored to perform all her duties as a wife: "but that, notwithstanding, her husband's conduct to her became daily more and more intolerable, by threats of violence to her person and charging incontinency, so as to render her life miserable; that, especially for the last three months of her residence with him, her treatment from him was cruel in the extreme; that she was once compelled to leave his house and seek protection at a neighbor's from the threatened violence to her person from her infuriated husband; and that often in the night, when he would awake and find her distressed by reflecting on her forlorn condition, he charged her with having illicit intercourse with one Henry Grady before her marriage and attributed her wakefulness to the lashings of a guilty conscience for her past whoredoms; and that, day after day, in the presence of his children by a former marriage, was she compelled to hear herself called by him the usual appellation of whore." The petition further states "that the petitioner

bore without a murmur this cruel treatment, in the hope that, by inquiring into her character, her husband would become convinced that the charge was unfounded; but that, except in the presence of strangers, his conduct towards her became daily more barbarous, until she became satisfied, that her life would no longer be safe under his roof, and that she then left for her father's, ostensibly to have the aid of her female friends during her approaching confinement with her first child, but inwardly resolved never to return to her husband, until she had some assurance of a change in his conduct towards her." The petitioner then avers "that she never gave her husband any reason for his discontents, and that the charge made by him against her reputation is wholly false, and that it was only trumped up by him to cover an ulterior purpose of driving her from his house, as he knew her character to be good, and had declared, that he did not marry her for any love he had for her, but through the persuasions of others."

The answer states, that the defendant was at his marriage the Clerk of the County Court of Buncombe and resided in Asheville, and that his wife then lived with her father, John Murry, in the County of Henderson: that after the marriage Mrs. Harrison went home with the defendant and lived with him thirteen months; and that, for about ten months, they lived in peace and affection, and she was kind and dutiful as a wife and careful of his domestic concerns; but that, about that period, she became negligent of her household duties and indifferent to him; that, nevertheless, he over-looked it, as he did not suspect a want of affection for him, and attributed her conduct to melancholy and a predisposition to hysterics; that she became greatly dissatisfied with Asheville, and urged him to remove to the neighborhood of her relations in Henderson; but that he could not do so, as his duties in office and interest required him to reside in Asheville. The answer further states, that her neglect and indif-

ference increased to such a degree, that he felt obliged to admonish her; and admits that, being a man of hasty temper, he may have done so more rudely and harshly than was becoming. The answer then states, that, a short time before the petitioner left the defendant's house, her father suggested to them, that, as the period of her confinement was approaching, it would be prudent she should go to his house, where she could have the assistance of her female friends; and that the defendant readily assented, and furnished the necessary means for her going, and did not then entertain the slightest suspicion of any dissatisfaction on her part. Soon afterwards he was informed, by a letter from Mr. Murry, of the birth of a daughter, and immediately the defendant went to Henderson to see his wife and child, and, after remaining with them a night and day, took an affectionate leave of them, being under the necessity of returning to his business. The answer further states, that, when the defendant sat off home, Mr. Murry, the father, accompanied him some miles, and then informed him, for the first time, that the petitioner "had concluded not to live with this defendant, because" as he said "her ways and his ways were different." The answer then states various efforts of the husband, by his personal solicitations to his wife and through her father and a brother-in-law, to effect a reconciliation, by making acknowledgments for any unkind expressions he might have used at unguarded moments—all of which were unsuccessful, by reason, as the defendant believed, of the final opposition of the wife's father. The answer then denies positively, that the defendant ever offered or threatened violence to the wife's person; or that she ever had, to his knowledge, to ask the protection of a neighbor's house from his threats of violence; and that he ever called her "whore" under any circumstances, or accused her of incontinency at any time, or believed her guilty of it. He says, that, while they were engaged to be married, the petitioner informed

him. that at one time she had been engaged to one Henry Grady; but that she did not know his character at the time, and, discovering afterwards that he was a wicked man, she broke off the match; and that, after their marriage, the petitioner resumed the subject of her engagement with Grady, and then added some circumstances, which she had before withheld, and induced the defendant to remark, "that no prudent woman, who wished to stand above suspicion, would have conducted herself so," and that, the defendant states, was the only remark ever made by him to his wife, from which she could infer he intended to make the charge of unchastity.

When the cause came on for trial, several issues were, at the instance of the plaintiff's counsel, made up and submitted to a jury, upon the several facts alleged in the petition, that is to say, whether the defendant ever threatened violence to the plaintiff's person? Whether she was ever compelled to leave his house and seek protection of a neighbor, for fear of violence to her person threatened by her husband? Whether the defendant, in the presence of his children, or at any time, called the petitioner a whore, or charged her, before she left him, with illicit intercourse with Henry Grady before marriage, or attributed her wakefulness to the lashings of a guilty conscience for her past whoredoms? To those issues the plaintiff's counsel moved to add one in these words: "Did the defendant, before the petitioner left his house, offer such indignities to her person, as to render her condition intolerable and her life burthensome?" But the Court refused the motion.

The plaintiff then read to the jury several depositions, as evidence on the other issues. They were those of the father, mother-in-law and sister of the plaintiff, and they proved, in substance, that, after the separation, the wife stated to her familiar friends. that her husband had made accusations against her of fornication with Grady, and said she would not return to live with him, unless

he changed his opinion on that point, because, unless he did, they could not live in any quiet or comfort. The father, upon the visit of the defendant to his wife after the birth of the child, first communicated to the defendant information of his wife's statement; and, in reply the defendant, after expressing his surprize and mortification, stated to Mr. Murry, that, before their marriage, his wife had informed him of her engagement to Grady, and that he, Grady, had travelled in company with her on one occasion, while they were engaged, from Henderson to Macon County on a visit to her sister; but that the match had been broken off by the opposition of her father, who knew Grady's character; and that the defendant further stated to him, that, after the marriage, his wife represented to him, that, during the engagement with Grady, he attended her three times on visits to Macon, and that once they met on the road, after she had left home; and that he considered Grady a dissolute man, and told his wife, that her conduct was very imprudent and censurable and unbecoming a virtuous woman. Upon being asked, whether the defendant charged his wife with incontinence, the witness, Mr. Murry, replied, that he could consider his observation nothing less, as he had admitted he had complained of his wife's keeping Grady's company improperly, and did not deny the representations of his wife, that he had accused her of incontinence. The other evidence was much of the same character; and all the witnesses proved, that the defendant often said, that he never discovered any evidence of unchastity in his wife, while she lived with him, and was importunate for her return to him.

The Court instructed the jury, that the evidence did not support the issues on the part of the plaintiff, and they found accordingly. The Court dismissed the petition and the plaintiff appealed.

*N. W. Woodfin*, and *Francis*, for the plaintiff.

*Avery*, for the defendant.

RUFFIN, C. J. The Court is of opinion, that the instructions to the jury were right. There is no pretence, that the material allegations of violence or threats of violence by the husband to the wife are true, or that she was compelled to leave his house, through fear of him. The remaining allegations of specific facts are, that the husband used the opprobious language to the wife, charging her with unchastity, as set out in the libel and the issues. There is no evidence to the fact of any altercation between the parties, or improper language used by the one to the other. The only evidence is that of a subsequent conversation between the husband and the near relations of the wife, in which he makes admissions, that some things had passed between them, which were calculated to produce in her mind an impression, that he harbored suspicions of her regard for a former suitor, and, perhaps, had not entire confidence in her previous purity of mind and prudence. But, although the father, with, perhaps, an excusable tenderness for his daughter's honor, says he could understand, from his conduct, nothing less than that the defendant had accused his wife of incontinence, yet that is stated, merely as a matter of inference from the impressions, which the wife's communications to him, of her associations with a dissolute man, had made on him with respect to her sympathies with that person, and her prudence, as a discreet and modest maiden, in indulging and exhibiting those sympathies, in the manner she did. It does not appear, that the defendant ever admitted, that, either in her presence or elsewhere he applied to the wife the very gross epithet of "whore," or imputed the actual guilt of criminal conversation; and he swears positively that he never did under any circumstances, nor did he entertain such a belief. Even upon the hypothesis, that such an occurrence between husband and wife, as that supposed, would justify her in leaving him without ex-

planation or notice, and would entitle her thereafter to a decree for separation and maintenance—a point we do not decide—yet the evidence, here offered, established no such case, and could not authorize the jury to find it.

The Court likewise concurs in the opinion, that an issue ought not to have been raised, in the general form of an enquiry "whether such indignities to her person as rendered her life burthensome" had been offered to the wife by the husband. It is for the Court to judge, what are "such indignities." The statute requires "that the material facts charged" in the bill shall be submitted to the jury; and it is their whole office to respond as to them. It is clear, that a divorce could not be granted upon a libel, which charged only, that the husband offered such indignities to the wife's person as to render her condition intolerable or life burdensome, without alleging any overt act of indignity. It is therefore a finding of facts, which constitutes indignities, legally speaking, which alone can entitle the plaintiff to a decree: otherwise there always would be a surprize on the defendant.

Per Curiam. Decree affirmed.

## EVAN S. HOWELL & AL. vs. HENRY HOWELL & AL.

Where there is a conveyance of chattels in immediate and absolute property, and there is in the same indenture a distinct personal covenant of the grantee, that the grantor shall have certain uses of the property during life, that ought not to be construed as a reservation of a life estate, but taken as a covenant merely; chiefly, because the granting part of the instrument would otherwise be made void, and thus the whole contract become of none effect.

All instruments, made at the same time and relating to the same subject, may be treated but as one and construed together, where this is necessary to effectuate the intention, and the provisions of the instruments, so put together, will not be incompatible.

But when contracts are put into several instruments, each of which has a sensible meaning, and may have a full operation by itself, they ought not to be put together for the purpose of making them mean, as one, differently from what they could in their separate state, and especially when the effect of such consolidation would be to avoid an essential part of the contract.

Appeal from the Superior Court of Law of Haywood County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

This is an action of trover for a mare, negro Jack, and several horses, cattle, and other goods, and was tried on the general issue.

The defendant, Henry Howell, owned all the articles, and on the 1st day of July, 1843, in consideration of natural love and affection, and of the sum of $300, he conveyed them, and also a tract of land, by two deeds, to his three sons, who are plaintiffs in this action. At the same time the plaintiffs gave their father an obligation in the penal sum of $1,000, with conditions as follows: "The conditions of the above obligation are such, that whereas the said Henry Howell hath sold all his property—see deed for land, and bill of sale for negro, stock, and property—and now we, N. G. Howell, &c. for the love we have for our father, do put into his possession a certain negro, named Jack, one grey horse," [and sundry other

horses, cattle, sheep, hogs, crops of wheat, corn, rye, oats —as conveyed to them] "that is on the plantation, where the said Henry lives; and he the said Henry is to continue in possession of all the aforesaid property during his natural life by taking good care of the same, or as long as he may remain on the same place, for him to make the necessary support of life: Nevertheless, it is expressly understood, that the said Henry is not to remove any part of this property off the premises, that the said Henry now lives on, without consent of the said N. G. Howell &c. neither to hire nor lease said property without consent of the said N. G. Howell &c.: and it is further understood, that, when the said Henry is so unable by any infirmity to support himself and property, the said property is to be surrendered up to the said N. G. Howell &c. and we are to support our father in sustenance during his natural life, provided the said Henry will live with his children: and none of the property is to be removed more than eight miles from the premises the said Henry now lives on, then all the said property together with the said land and negro, to be surrendered to the said N. G. Howell &c. at the instant the said property is removed—then this obligation, &c."

Also at the same time the father, Henry Howell, gave to the plaintiffs his obligation in the sum of $1,000 with conditions, "that the said Henry do well and truly take care of the farm and all the premises that he now lives on, &c. take good care of a negro named Jack, and all the stock and property that I, Henry Howell sold to N. G. Howell, &c.: and I do bind myself that I will not remove said property, nor hire nor lease the same to any person, without the consent of said N. G. Howell &c. and, if I should, the aforesaid property is to go into possession of said N. G. Howell &c. and I am to be dispossessed of any benefit of said property."

On the 28th of September, 1843, Henry Howell conveyed to the defendant, Battle, the land, and all the personal

property, now sued for, by deeds, purporting to convey the land in fee, and personalty absolutely. The plaintiffs thereupon demanded possession from the defendants, and after a refusal, brought this suit.

The Court instructed the jury, that the legal effect of the deed, executed by the plaintiffs, taken in connexion with the other deeds which were executed at the same time, was to give Henry Howell an estate for life in the negro and other chattels: and that the life estate amounted to the absolute property in all except the negro, and therefore, that as to them this action could not lie: And as to the negro the Court charged, that by the deed Henry Howell had but a life estate, and that the reversion was in the plaintiffs; but that, nevertheless, they could not recover for him, because the condition, that said Henry should not remove, nor hire him without the consent of the plaintiffs, was repugnant to his estate and void, and also because the performance of that stipulation was secured by the obligation of the father for $1,000, instead of a provision for the re-vesting of the property in the plaintiff.

*N. W. Woodfin*, and *Francis*, for the plaintiffs.
*Gaither*, and *Edney*, for the defendants.

Ruffin, C. J. The Court is of opinion, that the construction put on the instrument given by the plaintiffs is erroneous. It is in form a personal obligation of the sons, under a penalty, that the father shall, upon certain terms, possess and enjoy the property as long as he will live on the land. The question is, whether it is to be taken according to its form and natural sense, or to be construed to be a reservation or conveyance of the legal estate, to the father for life. The true principle for the construction of all instruments, is that of effectuating the intention of the parties, if it can be done. When there is but one instrument, the different parts ought to

be reconciled, if possible, so as to make each separate, and the whole received in such a sense *ut res magis valeat, quam pereat.* If, indeed, a conveyance be made of chattels, to take effect after a life estate, or if the grantor of chattels expressly reserve a life estate, there is no helping the grantee, unless under some statute; because at the common law, nothing remained, after the life estate, to be conveyed. But if there be a conveyance of chattels in immediate and absolute property, and there be in the same indenture a distinct personal covenant of the grantee, that the grantor shall have certain uses of the property during life, that ought not to be construed as a conveyance, or rather a reservation of a life estate, but taken as a covenant merely; because it is in that form, which of itself, indicates the intention to a great extent; and chiefly, because the granting part of the instrument would otherwise be made void, and thus the whole contract become of none effect. Much more does a construction in support of all parts of the contract commend itself, when the different parts are put into separate, and apparently in different instruments. There is no doubt, that all instruments, executed at the same time and relating to the same subject, may be treated as forming but one and construed together. But that is not the natural construction, and is only resorted to in order to effectuate the intention, and where the provisions of the two instruments, if put together, will not be incompatible. Where contracts are put into several instruments, each of which has a sensible meaning and may have a full operation, by itself, it would be a hazardous assumption to put them together for the purpose of making them mean, as one, differently from what they could in this separate state. And, certainly, the Court can not do such violence to the intentions of the parties, and the language in which they are expressed, as to consolidate separate instruments, when the effect of doing so would be to avoid an essential part of the contract, and make an estate, intended to be granted, fail altogether.

Here the legal title of the land, negro and other chattels was conveyed to the plaintiffs by the deeds to them, taken in their natural import and by themselves. The contract on the part of the sons purports to be a pecuniary obligation, with certain under-written stipulations to be performed as conditions. It was unquestionably intended, that the sons should have some title in all and each of the things conveyed; and the only way in which they can, is to vest the whole in them absolutely; for they get nothing, if their grantor reserved a life estate. This is certainly so as to all the chattels except the negro; and that governs the construction, because it is conclusive of the intention as to them, and therefore as to the negro and land also, which are all included together in the condition, of the bond, and the same provision made as the whole. In this very case the Superior Court was obliged, upon the construction there adopted, to hold, that the grant to the sons of the perishable chattels was annulled *ab initio*, by the estate for life supposed to be reserved to the father. That seems to us to be an unanswerable argument against putting the obligation of the sons to the deed of the father; for it not only modifies the operation of the latter, but, as to the chattels, defeats it entirely. In fine we do not see any reason, why either the obligation of the sons, or that of the father, in the same penalty, and importing to be personal contracts, should not enure as such merely; or why the former should be allowed to operate as part of the deed, made by the father, and thus defeat the estate granted therein.

Per Curiam. Judgment reversed and *venire de novo*.

DEN ON DEMISE OF N. G. HOWELL & AL. vs. HARRY HOWELL & AL.

The estate of a tenant at will is determined by a demand of possession by the owner, and also by his own conveyance in fee.

Appeal from the Superior Court of Law of Haywood County, at the Spring Term 1846, his Honor Judge PEARSON presiding.

*N. W. Woodfin*, and *Francis*, for the plaintiffs.
*Gaither*, and *Edney*, for the defendants.

RUFFIN, C. J. The lessors of the plaintiff are the same persons, who were the plaintiffs, in the action of trover, decided at this term, of *Howell* v. *Howell and Battle*. And the same question arose in this case, as in that, as to the construction of the deeds of the father to the sons, and of the obligation of the latter to the former, and the same instruction was given to the jury, who found accordingly, and the plaintiff appealed.

It is true, that under the statute of uses, an estate in the land might be made to arise to the sons, at the death of the father; and if it had been so expressed in the deed made by the father, the plaintiffs could not recover. But it is not so expressed, nor can the estate for life to the father be raised at all, without connecting the deed and obligation together. Now, whether that ought to be done, or not, depends upon the necessity for doing so in order to effectuate the intention, or upon its effect in defeating the grant or a part of it. In a case between the same parties this Court held, that these instruments could not be incorporated, because that would annul the grant of the chattels conveyed by Howell to his sons. As that is decisive of the intention of the parties, that the instruments should not be embodied, but that each should operate *per se*, it follows, that the legal title to the land is in the lessors of the plaintiff and that he ought to recover.

A further objection was raised, in the argument here against the action; which is, that the father became, at least, the tenant at will of his sons, and that they ought to have given reasonable notice, before this suit. The answer is, that merely as a tenant at will, his right was determined by both the demand of possession by the lessors of the plaintiff and also by his own conveyance in fee before the action brought.

PER CURIAM. Judgment reversed and *venire de novo*.

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ANDREW H. KILLIAN *vs.* JOSHUA HARSHAW.

In the construction of covenants, technical rules are not to be so much consulted, as the real meaning of the parties, where it can be gathered from the instrument itself.

To arrive at the intention, sentences may be transposed and insensible words, or such as have no distinct meaning, may be rejected.

The whole instrument must be taken together, and one part may be explained by another.

The case of *Foster* v. *Frost*, 4 Dev. 426, cited and approved.

Appeal from the Superior Court of Law of Cherokee County, at the Fall Term, 1846, his Honor Judge CALDWELL, presiding.

This was an action of covenant. At a public sale of lands, belonging to the State in the County of Cherokee, in the year 1838, David R. Lowry purchased a lot in the town of Murphy, at the price of $195. According to the terms of sale, he paid one eighth of the purchase money and received a certificate of the purchase. He sold the lot to the plaintiff, and assigned him his certificate. Killian sold to the defendant, upon the conditions contained in the following covenant, to-wit: "February 27th, 1844. This day after a trade being made by the undersigned, whereas A. H. Killian both sold unto Joshua Harshaw a certain lot in the town of Murphy, Lot No. 7.

containing one half acre, which lot was purchased at the land sale in North Carolina, in the year 1838, by David R. Lowry—Now if the said Lowry does well and truly pay to the State of North Carolina the purchase money on the said lot and *make a title to Joshua Harshaw*, then the said Harshaw is to pay the said A. H. Killian $195, or account to him in a settlement for the same. But if the said Lowry fails to pay the same to the State, then the said Joshua Harshaw is to pay the State himself, in consideration for the lot, before above mentioned, or should D. R. Lowry have paid a part of the $195, the remaining part of the said sum is to be accounted for to A. H. Killian by the said Joshua Harshaw." The breach is assigned on the last clause in the covenant; and the jury, under the directions of the Judge, gave the plaintiff a verdict for $160 73, being the whole amount of the original purchase, less the one-eighth paid by Lowry at the time of the sale.

Judgment being rendered pursuant to this verdict, the defendant appealed.

*Francis*, for the plaintiff.
*Gaither*, and *Edney*, for the defendant.

Nash, J. In the opinion of the presiding Judge we think there is error. The covenant is drawn very inartificially; but still the real meaning of the parties is, upon a careful inspection, apparent. It is well settled, that, in the construction of covenants, technical rules are not so much consulted, as the real meaning of the parties, where it can be gathered from the instrument itself. And to arrive at the intention, sentences may be transposed, and insensible words, or such as have no distinct meaning, may be rejected. The whole instrument must be taken together, and one part may be explained by another. *Foster* v. *Frost*, 4 Dev. 426. The first stipulation in this covenant, as to the price, is a key to the others following, and particularly

to the one we are considering. By the terms of the sale, the purchaser was obliged to pay, at the time, one eighth of his purchase money. Upon making this payment he received a certificate of purchase; and, not until he paid the whole, could he receive a grant. Lowry had made this first payment. This was known to the parties to this covenant, but it was not known, whether he had made or would make any further payment, or, if so, to what amount. By the sale to the plaintiff, he was substituted to the rights of Lowry, in the purchase from the State; and, like him, could not obtain a title, until the claim of the State was satisfied, and the defendant by *his* purchase occupied the same position. By the first condition it is stipulated, that, if Lowry had paid or should pay to the State the whole purchase money and make a conveyance to Harshaw, then the said Harshaw is to pay to Killian $195, the whole of what Lowry had paid, the full purchase money of the lot; and this, because Killian had, by his purchase, acquired the contract of Lowry. It was, as, if *he* had paid the money to the State, he was entitled to receive it back from Harshaw. All this is plain, and it thereby appears, this was the whole that was to be paid by the defendant. But the second and third conditions are contradictory, and cannot stand together, under the construction put upon the latter in the Court below. They are as follow: But if the said Lowry refuse to pay the same to the State, the said Harshaw is to pay the State himself; and, in that case, there is no provision for any payment to the plaintiff, for he will have paid nothing either by himself or by Lowry. But if Lowry has paid a part of the $195, "the remaining part of the said sum is to be paid to Killian." Now it was known to the parties, that Lowry had paid the one eighth, for they knew, that, without so doing, he could not have obtained his certificate of purchase. Lowry was bound to the State for the other seven eighths. Killian was not, and could not be called on for it—neither

was Harshaw bound. According to the second condition, if Harshaw paid the purchase money to the State, which was seven eighths and which was all that the State could claim, there is no express provision for any other or further payment to any one by him. But, under the construction put upon the third condition by the plaintiff, if Lowry had not paid more than the eighth, the defendant was bound to pay the plaintiff the other seven eighths, leaving the defendant still to pay the same sum to the State, before he could get a title. This, it appears to us, could not be the true intent of the contract. What the parties to this covenant meant, was, that the defendant should pay to the plaintiff all that Lowry had paid or should pay to the State, in the purchase of the lot. This construction is in conformity to the first condition which is plain and sensible, and is fortified by the fact, that in the third condition, the sum mentioned, as to be paid to Killian, corresponds exactly with the purchase money to be paid by Lowry. It is admitted by all parties, that the covenant is obscurely worded; and it is our duty to put upon it such a construction, as, in our opinion, will carry out the intention of the parties, as appears on the face of the instrument. The defendant binds himself to complete the purchase from the State. If, in so doing, he has the whole of the purchase money to pay, he is to pay no more to any one. If Lowry has paid the whole, then the defendant is to pay the whole to Killian, upon getting a title from him. If less than the whole has been paid by Lowry, the defendant is bound to pay what is still due to the State, so as to entitle him to call for a conveyance of the lot from its officers. Such appears to us the true construction of the instrument. It does injustice to no one, while that put upon it in the Court below evidently compels the defendant to pay for the lot twice—once to the plaintiff and again to the State—before he can get his title.

Per Curiam. Judgment reversed and *venire de novo* ordered.

# INDEX.


AMENDMENT.

The plaintiff having recovered one thousand dollars as damages for the detention of slaves, whereas the damages laid in the writ and declaration were only two hundred dollars. *Held*, that the plaintiff might in the Supreme Court amend his writ and declaration, so as to state the damages at one thousand dollars, he paying all the costs of the suit. *Clayton* v. *Liverman*, 92

APPEAL.

1. Where a defendant on an appeal from the judgment of the County Court, gave but one surety, the surety cannot, on the judgment being affirmed in the higher Court, object to a judgment against himself, on the ground that the Statute requires two sureties on an appeal from a Justice. *Cochran* v. *Wood*, 215
2. The sureties are required for the benefit of the plaintiff, and he may dispense with them in whole or in part, at his option, *Ibid.*
3. A joint judgment was obtained before a Justice of the Peace against A and B. A appealed to the County Court and gave C as the surety for the appeal. At the June Session, 1843, of the County Court, judgment was entered against B, and also against C, the surety, both A and B having appeared and pleaded in the County Court. At December Session, 1842, on

motion the judgment against C was vacated. From this order the plaintiff appealed to the Superior Court. The Superior Court dismissed the appeal on the ground, that there was no error in the judgment of the County Court at its December Session, 1843. *Held*, That the appeal from the Justice took up all the proceedings to the County Court; as, the judgment being joint, one half of it could not be vacated, and the other left valid in the Magistrate's Court. *Ramsour* v. *Raper*, 346

4. Where, in a suit pending in the County Court, an award by referees under a rule of Court is made in favor of the plaintiff, and the Court sets aside the award and orders a trial, upon which there is a verdict for the defendant, the plaintiff cannot, by then appealing, bring the questions on the award before the Superior Court. He should, as he had a right to do, have appealed from the decision of the County Court upon the award. *State* v. *Laws*, 375

ARBITRATION.

When a submission to arbitration is by bond and an award is made, if the award be for the payment of money, a suit may be brought either on the bond or on the award, at the option of the party claiming benefit under it. *Thompson* v. *Childs*, 435

ASSUMPSIT.

1. Where a person owing a debt has two agents, and one of them pays the debt to a constable, with whom it had been placed by the creditor for collection, and afterwards the other agent pays the same debt to the creditor himself; *Held*, that the principal might recover back this money, without shewing that the constable had paid to the creditor what he had collected. *Pool* v. *Allen*, 121

2. Where wrecked goods were placed und'r the care of the wreck-master by the Captain of a vessel, to be disposed of according to law. and the owner, afterwards and before a sale, promised the wreck-master that, if he would deliver up the goods to him, he would pay him his commissions; *Held*, that there was a sufficient consideration for the promise. *Etheridge* v. *Thompson*, 127

3. Where A. who is an indorser on the note of B. after it becomes due borrows money from a bank on his own note with surety, and with it discharges B's. note, which

also belonged to the bank. *Held*, that A. before paying up his own note in the bank, may maintain an action against B. for money paid to his use.—*Hall* v. *Whitaker*, 353

ATTACHMENT.

1. Where a defendant in an attachment is brought before a Magistrate, not by a levy on his property, but by summoning a garnishee, no advertisement or notice in writing is required. *Parker* v. *Gilreath*, 400
2. An attachment, served in the hands of a garnishee as a debtor, is substantially an action at law by the defendant in the attachment, and, therefore, the plaintiff in the attachment cannot recover against the garnishee, in a case in which the defendant in the attachment could not have recovered the same debt. *Patton* v. *Smith*, 438

ATTORNEYS.

Where the condition of a bond was that A. should pay to B. and C. attorneys, one hundred dollars, on condition that they cleared A. of three suits and three indictments in the Superior Court, and A. was cleared in the Superior Court of all the cases except one, in which he was convicted and the case was taken to the Supreme Court, where A. had to employ another attorney, but the judgment below was reversed, and A. discharged from the prosecution; *Held*, that B. and C. had substantially complied with the condition precedent and had a right to recover from A. *Candler* v. *Trammell*, 125

AUCTION.

1. If A. employ a crier or auctioneer, to cry property at a public auction, without directing him not to cry the bid of B., and B. is the last and highest bidder and the property is knocked off to him, then the contract is complete, provided B. complies with the terms of the auction. *Ricks* v. *Battle*, 269
2. It is no defence to an action by B. against A. for a breach of this contract, that A. had previously told B. his bid should not be received, unless she so directed the crier or auctioneer, or unless she objected at the time of the bidding and before the property was knocked off. *Ibid.*
3. What is stated by an auctioneer in his advertisement may be explained by what is said by him at the time of the sale. *Rankin* v. *Matthews*, 286

BANK OF CAPE FEAR.
Under the charter of the Bank of Cape Fear, the Bank is exempted from all Taxes, Town as well as County and State Taxes. *Bank of Cape Fear* v. *Deming*, 55

BASTARDY.
In a case of bastardy, after the defendant has had an issue tried under the Statute, and the verdict is against him, it is too late for him to move to quash the proceedings, because the mother of the child, who was examined before the Magistrate on oath, was a woman of color. *State* v. *Lee*, 265

BILLS AND PROMISSORY NOTES.
1. The alteration of a bill or note in a material part vacates the bill or note, except as between the parties consenting to such alteration. *Davis* v. *Coleman*, 424
2. Cutting off the name of one of the makers of a promissory note, and substituting another, is a material alteration. *Ibid.*

BOND.
1. It is of the essence of a bond to have an obligee as well as an obligor; it must shew upon its face to whom it is payable. *Phelps* v. *Call*, 262
2. The defect cannot be supplied by shewing a delivery to a particular person. *Ibid.*

BOUNDARY.
1. Where a grant called for certain courses and distances, and from the last (the third line,) "thence No 87 W. 199 poles to a hickory, thence *the courses of the Swamp* to the beginning." *Held*, that tho' the distance from the last corner to the Swamp gave out nine chains and fifty links from the Swamp, and no hickory corner was to be found, nor was there any proof of its existence, yet the line should be extended to the Swamp and thence pursue its courses. *McPhaul* v. *Gilchrist*, 169
2. *Held* further, that the declaration of an owner of the land, that his fourth line run from the termination of the distance mentioned in the third line, directly to the beginning, did not of itself divest him of his title to the land, lying between that line and the Swamp. *Ibid.*
3. When nothing but course and distance is called for in a deed, parol evidence is not admissible, to shew that a line of marked trees not called for in the deed is the true boundary. *Wynne* v. *Alexander*, 237
4. When one corner is established and the course and distance only given

and the next corner called for in the deed is also established, the line must run directly from the one corner to the other, although there may be a line of marked trees between the corners. but varying in some places from the direct line. *Ibid.*

5. Nor is it sufficient to make an exception to this rule, that the trees were marked as the line by the parties, at the time when the deed was executed from one to the other. *Ibid.*

6. In a controversy about boundary, the plaintiff may give in evidence a recovery in an ejectment suit, twenty-five years ago, by one under whom the plaintiff claims against the defendant and the subsequent abandonment by the defendant of the land now claimed by the plaintiff. *Gilchrist* v. *McLaughlin*, 310

7. Where, in running a line, another line is called for, and the distance gives out before reaching the line called for, the distance is to be disregarded. *Ibid.*

See EJECTMENT.

CHEROKEE LANDS.

1. Under the Acts for the sale of the Cherokee lands, the purchaser has a right, upon the certificate of his purchase from the commissioners, to institute an action of ejectment, in the name of the State, against any person in possession. *State* v. *England*, 153

2. The person, so in possession, cannot set up as a defence to this action, that he had received a deed from the purchaser, which had never been registered but which was alleged to be lost, or destroyed by an agent of the purchaser. *Ibid.*

CONFISCATION LAWS.

Under our confiscation laws, in the absence of commissioners or other officers appointed by law for that purpose, the County Court had no authority to seize, condemn and sell the property of any Tory of the Revolution, then dead, without notice to his heirs. *McPhaul* v. *Gilchrist*, 169

CONSTABLES.

1. Where a constable receives notes or other evidences of debt, a short time before his office expires, and does not collect them for want of time, and, after his office expires, refuses to deliver to the owner the notes or other evidences of debt, so placed in his hands, he and his sureties on his official bond are liable to an action for the amount. *State* v. *Johnson*, 77

2. If the constable had continued in office for another

year and the creditor had permitted the evidences of the debt to remain in the hands of the officer, it might be evidence of a new contract of agency, upon which the sureties of the second year would be liable. *Ibid.*

3. The bonds of constables, who are re-appointed from year to year, are not cumulative; and therefore sureties of a constable are only responsible for breaches committed during the official year for which they became his sureties, tho' at the expiration of the year, he may have been re-appointed. *Miller* v. *Davis*, 198

4. Where the only record of the appointment and qualification of a constable was in the following words, to-wit: "James R. McMinn appeared in Court and filed his bond as constable for the County of Henderson for one year and was duly sworn." *Held*, that, under the Act of 1844, curing defects in the official bond of certain officers therein named, this was sufficient evidence of the appointment of the constable, and of his having qualified and given bond. *State* v. *McMinn*, 344

CONTRACT.

1. The plaintiff sold to the defendant some cattle for $50. He received from the defendant a promissory note for thirty dollars, payable the first of January, ensuing; and a bank note for twenty dollars, which was to be returned, if not found to be good, and the defendant was to have credit until the first of January. The bank note was returned as also the due bill, which was destroyed by the defendant, who then offered to pay ten dollars and give his note with surety for $40, payable the first of the next January. The plaintiff refused to accept them. *Held*, that the plaintiff could not sue the defendant in a *quantum valebat* until after the first of January. *Gudger* v. *Fletcher*, 372

2. A due bill, though written with a pencil and not in ink, if legible, is good. *Ibid.*

3. A covenant was executed by B and C reciting that whereas A had loaned to D $1,600 and D was desirous of securing the same, they, B and C, bound themselves to A, that if D did not pay the debt before the 30th day of February, 1844, they would pay it at the time stipulated and waive notice. This is not a mere guaranty, but an absolute promise to pay the money, if D did not pay it at the time stipulated and no

notice was necessary.—*Williams* v. *Springs*, 384

4. The following instrument was signed, sealed, and delivered. "Know all men by these presents, that I, Edward Teague, have this day bargained for a sorrel filly with W. Gaither, which filly I want to stand as security until I pay him for her. I also promise to take good care of her. Witness my hand and seal, this 5th of October, 1838." *Held*, that, upon the face of the paper, it was doubtful, whether it was intended as a mortgage or a conditional sale, and that it was properly left to the jury to determine its character from the accompanying circumstances. *Gaither* v. *Teague*, 460

5. Where there is a conveyance of chattels in immediate and absolute property, and there is in the same indenture a distinct personal covenant of the grantee, that the grantor shall have certain uses of the property during life, that ought not to be construed as a reservation of a life estate, but taken as a covenant merely; chiefly, because the granting part of the instrument would otherwise be made void, and thus the whole contract become of none effect. *Howell* v. *Howell*, 491

6. All instruments, made at the same time and relating to the same subject, may be treated but as one and construed together, where this is necessary to effectuate the intention, and the provisions of the instruments, so put together, will not be incompatible. *Ibid.*

7. But when contracts are put into several instruments, each of which has a sensible meaning, and may have a full operation by itself, they ought not to be put together for the purpose of making them mean, as one, differently from what they would in their separate state, and especially when the effect of such consolidation would be to avoid an essential part of the contract. *Ibid.*

## COSTS.

1. Where the plaintiff declares in three counts and enters a *nolle prosequi* on two of them, but obtains judgment upon the third, the defendant is not entitled to recover any costs, though he had summoned witnesses, who were admitted to be relevant, to defend himself against the counts, on which the *nolle prosequi* was entered. *Costin* v. *Baxter*, 111

2. The recovery of costs depends upon statutory regulations, and by our

statute on the subject, the party, who obtains a judgment, is entitled to his costs. *Ibid.*

COVENANT.

1. Where a covenant is entered into for the delivery of a variety of articles, the condition is broken, if all are not delivered. *Poteet* v. *Bryson*, 337
2. In the construction of covenants, technical rules are not to be so much consulted, as the real meaning of the parties, where it can be gathered from the instrument itself. *Killian* v. *Harshaw*, 497
3. To arrive at the intention, sentences may be transposed and insensible words, or such as have no distinct meaning, may be rejected. *Ibid.*
4. The whole instrument must be taken together, and one part may be explained by another. *Ibid.*

See CONTRACT.

DAMAGES.

1. Every man is presumed, in law, to intend any consequence, which naturally flows from an unlawful act, and is answerable to private individuals for any injury so sustained. *Welch* v. *Piercy*, 365
2. Therefore the defendant was liable, in an action of trespass *quare clausum fregit*, for the loss of hogs, &c. occasioned by the unlawful breaking down of the plaintiff's fence. *Ibid.*

DEED.

Where by a deed of gift, made in 1833, the donor conveyed a female slave to B, and then says, "that is, after my decease, to have and enjoy unto the said B, his heirs, &c." *Held*, that under the operation of our statute passed in 1823, (Rev. Stat. ch. 37, sec. 22,) the issue of the female slave, as well as the slave herself, passed to B. in the same manner as if this disposition had been made by will. *Baldwin* v. *Joyner*, 123

DEVISES.

See LEGACIES AND DEVISES.

DIVORCE.

On a petition by a wife for a divorce, the Court will not suffer an issue to be submitted to the jury in such general terms as these: "Did the defendant, before the petitioner left his house, offer such indignities to her person, as to render her condition intolerable and her life burthensome?" The petition must set forth the *facts*, the jury must pass upon those facts, and on their verdict the Court will determine, whether the facts found constitute or not a proper case for a

divorce. *Harrison* v. *Harrison*, 484

## EJECTMENT.

1. Where land is lapped by two deeds or grants, the adverse possession for seven years by a person, not being in possession of the lapped part, can give him no right against the superior title to the part so lapped. *Smith* v. *Ingram*, 175

2. If two grants lap and one of the claimants be seated on the lapped part, and the other not, the possession of the whole interference is in the former exclusively—possession of part of the lands included in both deeds being possession of all of it. *Williams* v. *Miller*, 186

3. In an action of ejectment, when the tenant in possession makes default, and another is let in, by consent, to defend, upon an admission of actual possession in that person, it must be understood that it was the object of those parties to try the title between themselves at once, without the delay or expense of a new suit. *Lee* v. *Flannagan*, 471

See Boundaries.

## ENTRIES.

Where surveys are made on any navigable water, the water shall form one side of the survey. And any island or islands in any navigable water may be entered, surveyed and granted. *Smith* v. *Ingram*, 175

See Grants.

## EVIDENCE.

1. When a witness, in giving his deposition, refers to a note, and, by way of identifying it, recites what he believes to be a correct copy of the note, no objection can be taken on that account to the deposition, and the party will be at liberty to introduce on the trial the original note so described. *Jones* v. *Herndon*, 79

2. Where the question is, whether an instrument of writing is a testamentary paper or a deed, it becomes a fact, to be proved by all kinds of evidence, by which, in law, any other fact may be established. The evidence, which arises from the face of the instrument, may be aided or opposed by evidence *aliunde*. *Clayton* v. *Liverman* 92

3. Therefore where A and B by an instrument of writing "gave and bequeathed" to C certain slaves "to have and to keep the aforesaid property at our death," and it was proved that the donors intended this as a deed of gift and so signed, sealed and delivered it.

*Held*, that this was a deed of gift and not a testamentary paper. *Ibid.*

4. A grand juror, on the trial of an indictment, may be compelled to disclose what was given in evidence by a witness before the grand jury. *State* v. *Broughton*, 96

5. Although a prisoner, on his examination, shall not have his examination, if given on oath, read against him, yet where a grand jury are investigating an offence, with a view to discover the perpetrator, and the person, who was subsequently indicted, was examined before them on oath and charged another with the commission of the offence, this examination may be given in evidence against the prisoner on the trial of his indictment. *Ibid.*

6. In an indictment for a libel, charging that the prosecutor "was called a murderer and foresworn," it is not competent for the defendant to justify by proving that there was and long had been a general report in the neighborhood that the prosecutor was a murderer and foresworn. *State* v. *White*, 180

7. In an action against two, of three partners in a firm, the plaintiff may introduce the testimony of a third partner, not a party to the record, though he could not be compelled to give his testimony. *Cummins* v. *Coffin*, 196

8. The evidence of a partner, in behalf of those sued as part of the firm, is not competent for them, because, in a suit for contribution, he is not only bound for his part of the debt recovered, but also for his proportion of the costs accrued in the action. *Ibid.*

9. The deposition of a witness, taken in a criminal case before the examining magistrate, under the Act of 1715, *Rev. Stat. ch.* 35, *sec.* 1, may be read in evidence on the trial of the prisoner, if the witness is then dead. *State* v. *Valentine*, 225

10. In such a case the deposition may be used either in chief, by either party, if the witness is dead, or upon the cross-examination of the witness in Court. *Ibid.*

11. The proof of the deposition is usually, but not necessarily, by the magistrate or clerk; but, in this State at least, there being no statutory direction as to the mode of proof, the probate must be a matter of sound discretion in the presiding Judge, keeping in view the general principles of evidence, alike necessary to the safety of the accused and the due

administration of the law. *Ibid.*

12. *Held*, in this case that, it appearing that the examing magistrate was necessarily absent in the discharge of high public duties, proof by the Clerk of the Superior Court, to which the deposition had been returned according to law—that he was present when the deposition was taken—that the examination was written down by the magistrate himself, and that the deposition, returned to his office and offered in evidence, was in the proper hand writing of that magistrate—was sufficient to authorize the reading of the deposition. *Ibid.*

13. A witness is not rendered incompetent by the commission of, or by the conviction for any crime, but only by a judgment upon such conviction. *Ibid.*

14. It is sufficient to admit a witness to prove a conversation of the defendant, when he says he can state all that passed on the occasion, when that conversation occurred, whether relative to that controversy or any other subject. It is not necessary for him to be able to state all the conversations of the defendant, which he heard before or after the conversation offered to be given in evidence. *State* v. *Cowan*, 239

15. When a magistrate, on the examination of a prisoner, accused of robbing an individual of a watch on the previous night and on whom the watch was found, told him "that unless he could account for the manner, in which he became possessed of the watch, he should be obliged to commit him, to be tried for stealing it, this did not amount to such a threat or influence as would prevent the introduction of the subsequent confession of the accused, especially as the magistrate repeatedly warned him not to commit himself by any confession. *Ibid.*

16. A prisoner may be convicted, upon his own voluntary and unbiassed confession, without any other evidence. *Ibid.*

17. If an indictment for robbing, under the statute, charges that the robbery was *in* the highway, the State cannot give in evidence that it was *near* the highway. *State* v. *Cowan*, 239

18. In criminal charges, the prisoner's character cannot be put in issue by the State, unless he open the door by giving testimony to it. But it is not a conclusion of law, that from his silence, the jury are

to believe he is a man of bad character. *State* v. *O'Neal*, 251

19. In this State the presumption is, that a black person is a slave. *State* v. *Miller*, 275

20. Where, on the trial of an indictment for murder, the prisoner proved a sufficient legal provocation at the time to extenuate the homicide, it is not competent to prove, in order to shew that the killing was not on the immediate provocation but from previous malice, that the prisoner, a year or a month previously, had declared his intention to kill two or three men, it being admitted that the prisoner had no reference in such threats to the deceased, as one of those men. *State* v. *Barfield*, 299

21. The acts and declarations of an accomplice are evidence when they are part of the *res gesta*, and done in furtherance of the common design. *State* v. *George*, 321

22. But to make the acts or declarations of another, evidence against a prisoner, a conspiracy or common design between them must be established. *Ibid.*

23. The interest, which excludes a witness produced in a suit, must be a legal and beneficial interest in the subject matter, for the recovery of which the suit is brought. *State* v. *Poteet*, 356

24. It is not sufficient that a witness believes himself interested, if in fact he is not; nor is it sufficient, if he conceives himself bound in morality and honor to make good any loss, sustained by the person, in whose favor his evidence is to be given, in consequence of a judgment against him. *Ibid.*

25. The leaning of the Courts, in modern times, is to let the objection, on the ground of interest, go to the credit, rather than to the competency of the witness. *Ibid.*

26. Where a return of a levy on land by a constable conforms, in its description, to the directions of the Act of Assembly, Rev. St. ch. 62, sec. 16, setting forth among other things, that the land lies on a creek, naming it, and it appears that there are several creeks in the county of that name, it is competent for a party to an ejectment suit, brought to recover the land sold under that levy, to shew which creek was intended, when the levy was made. *Parks* v. *Mason*, 362

27. The receipt of a deputy sheriff, for a claim put in his hands for collection, is evidence against the sheriff in an action for failing

to collect the claim. *Jarratt* v. *McGee*, 377
28. And as such a receipt binds the sheriff, it is, under the Act of 1844, competent evidence against his sureties as well as himself. *Ibid.*
29. In an action of debt on a covenant, proof of the hand-writing of the obligors, together with possession by the obligee, is evidence from which the jury may presume a delivery, in the absence of proof to the contrary. *Williams* v. *Springs*, 384
30. The circumstance of there being three seals affixed, without any names before them, is not sufficient to rebut the presumption of delivery, or to shew that those who did sign, did not intend that the covenant should not be delivered, until the other persons signed it. *Ib.*
31. The copy of a grant from the Register's Office is good evidence, where the production of the original is, from any cause, dispensed with. *Osborne* v. *Ballew*, 415
32. The declarations of a vendor, after he had sold property, are not evidence against his vendee, as to the title of the property. *Williams* v. *Clayton*, 442

## EXECUTIONS.

1. Where a judgment is for the penalty of a bond to be discharged on the payment of certain assessed damages, and the execution issuing thereon recites the judgment as for the damages only, this is a fatal variance and any sale under the execution is void. *Walker* v. *Marshall*, 1
2. Where a judgment is against heirs for lands descended, after the plea of fully administered has been found in favor of the administrator, and the execution issues against the goods and chattels, lands and tenements of the heirs, the execution is void. *Ibid.*
3. Under the statute, directing, that, upon judgments against infant heirs, the execution shall be stayed for twelve months, the guardian of the infants has a discretion to waive the stay, and permit the execution to issue *instanter*, and the sheriff is bound to proceed upon such execution. *Heath* v. *Latham*, 10
4. Where, in the County Court, the suit was against three, and, on an appeal to the Superior Court, the judgment was only against one, without its appearing on the record what had been done as to the others: *Held*, that although the judgment in the Superior Court might have been erroneous or irregular, yet the judg-

ment was good until reversed, and under an execution issuing on it the Sheriff had legal authority to sell the property of the defendant against whom it issued, in conformity to such judgment. *Carter* v. *Spencer*, 14

5. A good execution in the Sheriff's hands sustains a sale under it, though wrongly recited or not recited in the Sheriff's deed. *Ibid.*

6. A vested remainder or a reversion in slaves may be sold under a *fieri facias*, subject to the temporary right of a hirer or other particular tenant. *Ibid.*

7. The bid of one person at an execution sale may be relinquished to another, who may take the sheriff's deed. *Ibid.*

8. An officer, who, under a *fi. fa.* from a justice, seizes a horse and mule, puts them up in a stable —though it be on the premises of the defendant —and sleeps on the premises during the night of the seizure has such a possession as justifies him in having an action against another officer, who goes during that night and takes away the property under another *fi. fa.* from a justice. *Rives* v. *Porter*, 74

9. It would be unnecessary to require an officer to remove property instantly. It answers all the purposes of giving notoriety to the levy, for the officer to take possession of the property on the premises, provided he remain there with it so as to be able to exercise over it that dominion, which owners in possession usually exercise. *Ibid.*

10. A purchaser at a Sheriff's sale of land, under execution, is only bound to shew a judgment, execution and the sheriff's deed. He is not bound to to shew a levy by the sheriff. His title is complete as against the defendant in the execution. *McEntire* v. *Durham*, 151

11. An execution upon a dormant judgment is not void. It is only irregular; and that is an objection, which can only be taken by the defendant in the execution—and not by the officer to whom it is directed, who is bound to serve it. *State* v. *Morgan*, 387

12. It is the duty of an officer to sell property levied on, in a way to bring the best price, unless the parties interested consent that the sale may be made in a different way. *Ibid.*

13. A sheriff has no right to return *nulla bona* on an execution, without making an effort to find property at the residence of the defendant in the execution, or making any de-

mand of payment or enquiry for property. *Parks* v. *Alexander*, 412

14. A mere general report that the debtor has no property will not justify such a return, if the debtor in fact has property, subject to be levied on. *Ibid.*

15. Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property, at the time and place specified, otherwise their bond will be forfeited. *Poteet* v. *Bryson*, 337

16. Where a slave has been conveyed by deed in trust for the payment of debts, a sale of such slave, under an execution against him who executed such deed, is not valid, at least while any of the debts remain unpaid. *Thompson* v. *Ford*, 418

17. The indorsement by such a trustee on the deed, "that he had sold (a certain negro) and satisfied the claims mentioned in the within deed and retained a balance of $ in my hands," does not purport or amount to a conveyance by him, but only shews, that he then no longer held the title for the creditors secured in the deed, as one of the trusts, on which he took it originally, but only for the maker of the deed, or such persons, as might be entitled through him, either by contract or act of law. *Ibid.*

18. The officer, making a levy on land under an execution from a Justice of the Peace, must make his return of the land he has levied on, on the judgment and execution, when they are on one and the same piece of paper; or on the execution when they are on different ones; or on same paper annexed to the one or the other, and which would constitute a part of it and have to be recorded with it. A sale under an execution issuing on a return differently made is void. *Dickson* v. *Peppers*, 429

19. When land has been sold by a sheriff under an execution and he dies before making a conveyance, the succeeding sheriff cannot make the conveyance, unless the purchase money has been paid to the sheriff who sold. *Harris* v. *Irwin*, 432

## EXECUTORS AND ADMINISTRATORS.

1. When a suit is brought upon an administration bond, the defendants have a right, under the plea of the general issue, to shew that the supposed intestate was alive at the date

of the letters of administration and of the bond, the County Court in such case having no jurisdiction. *State* v. *White*, 116

2. In like manner the relator of the plaintiff can shew that the person alleged to have been dead, intestate, was not the person, whom the defendants offered to prove was then alive, but some other person of the same name, who was then actually dead. *Ibid.*

3. In the administration of assets, judgments by Justices of the Peace are to be paid before bonds and notes. But as they are not matters of record, of which the executor or administrator is bound to take notice, actual notice of them must be given by the creditor. *State* v. *Johnson*, 231

4. The dormancy of a judgment does not at all affect its dignity in the administration of assets. *Ibid.*

FORGERY.

Falsely putting a witness' name to a bond, which is not required to have a subscribing witness, does not vitiate the bond and is not forgery. *State* v. *Gherkin*, 206

FRAUDS AND FRAUDULENT CONVEYANCES.

1. A being seized and possessed of an estate in fee in a tract of land, subject to a limitation over to B, in the event of A's dying without issue, made a fraudulent conveyance of the land. Afterwards B died, leaving A his heir at law. *Held*, that after the death of B the whole estate was liable to the satisfaction of A's creditors. *Flynn* v. *Williams*, 32

2. The Act, regarding fraudulent alienations of property, makes the fraudulent conveyance absolutely void, and in that way prevents the passing of any estate, as against creditors, &c. *Ibid.*

3. A fraud in the consideration or treaty, on which a deed is obtained, is a ground for impeaching it in equity, but it does not avoid it at law. To have that effect, it is necessary the execution of the deed should be obtained by fraud, so as to make a case for the defendants on the plea of *non est factum*. *Canoy* v. *Troutman*, 155

4. When land is conveyed in fee to a person, under certain trusts mentioned in the deed, the trustee can convey a *legal* title to the property, so as to enable the alienee to maintain an action of ejectment. The question, as to his equitable right to convey, for a different purpose than that authorized

by the trust, is one of purely equitable jurisdiction, and cannot be entertained in a Court of Law. *Ibid.*

5. Under the *Statutes of Elizabeth*, voluntary conveyances to children, as such, are not absolutely void as to creditors. To make them void, it must be shewn that the maker of the deed was indebted at the time, or so soon afterwards, as to connect the purpose of making the deed with that of contracting the debt and defeating it. *Smith* v. *Reavis*, 341

6. By indebtedness in such a case is not meant a debt of a trifling amount, in comparison to the donor's estate, but he must be "greatly indebted," or at least he must owe some debt, that remains unpaid and will be unpaid, if the conveyance be sustained. *Ibid.*

7. If a father, who conveys land to a son, be indebted at the time, that does not avoid the deed, provided the father pay that debt, or if he retain property sufficient to pay the debt and out of which the creditor can raise the money, when he seizes the land conveyed to the child. *Ibid.*

8. This deed was made before the Act of 1840–1, ch. 28. *Ibid.*

9. An indulgence for a year, upon obtaining a real security for an existing debt, which is necessarily made public by registration, is not so unreasonble as to raise a legal presumption of an intent to hinder a creditor by the security. *Lee* v. *Flannagan*, 471

10. On a question of fraud as to a deed of trust, &c. it is a proper subject of inquiry by the jury, whether the sale was to be in convenient time under all the circumstances of the parties. *Ibid.*

11. Where a deed in favor of one creditor is made *for the purpose* of defeating another creditor, it is fraudulent; but it is not so when the loss of the latter is *merely a consequence* of the preference given to a just debt. *Ibid.*

12. It would seem that a mortgage of land for a just debt cannot be a fraud upon another creditor, (since our Act of 1812,) because it cannot obstruct his remedy, by a sale of all that under any circumstances ought to be sold, namely, the debtor's whole interest in the premises. *Ibid.*

## GRANT.

1. Where a person has been not only in the actual occupation of a part of a tract of land for 25 or 30

years, but has also claimed it and exercised acts of dominion and ownership over it, up to a well defined boundary, for that and a longer time, this is altogether evidence to be left to the jury. to presume a grant of the land to the person and of conveyances to those claiming under him, who so held the possession. *Wallace* v. *Maxwell*, 135

2. At common law, land covered by water, was the subject of grant, except where the tide ebbed and flowed, and so it was in this State in the year 1839, the former legislative restrictions having been repealed by the Act of 1839, and not re enacted until the Session of 1839–40. *Hatfield* v. *Grimstead*, 139

GUARDIAN AND WARD.

A was appointed a guardian to certain infants at February Term, 1833, of the County Court, and so continued until May Term, 1841. During this time he never renewed his bonds as required by law. The first renewal should have been at February 1836 and the second at February 1839. In August 1837, W. W. was appointed Clerk and issued no notice to the Guardian to renew his bonds; *Held*, that the Clerk and his sureties were responsible for this neglect and were bound to make compensation to the orphans for any loss they sustained thereby. *State* v. *Watson*, 289

HIGHWAY.

1. A wharf, simply as such and not being a part of a street, is not a public highway. *State* v. *Cowan*, 239
2. The County Court has full power to *order* the laying out of public roads; but none to *lay them out*. The last power is given to a jury. *Welch* v. *Piercy*, 365
3. The Court has the power to decide, whether the public convenience requires the laying out of a road, and to order a jury for the purpose of laying it out; but it has no power, except as to the *termini*, to direct the jury or any one else, *how* it shall run, that being the exclusive province of the jury. their verdict being of course subject to the judgment of the Court, whether it shall be received or not. *Ibid.*
4. An order of the Court directing how a road shall be run and opened does not justify an overseer, who acts under it, and he is liable to an action by the party grieved. *Ibid.*

INDICTMENT.

1. Where on the trial of an indictment for murder, the prisoner's counsel object-

ed, that the name of the deceased as mentioned in the indictment was not his true name, that was a fact to be tried by the jury. *State* v. *Angel*, 27

2. The purpose of setting forth the name of the person, on whom an offence has been committed, is to identify the particular fact or transaction, on which the indictment is founded, so that the accused may have the benefit of an acquittal or conviction, if accused a second time. The name is generally required as the best mode of describing the person; but he may be described otherwise, as by his calling or the like, if he be identified thereby as the individual and distinguished from all others, and if the name be not known, that fact may be stated as an excuse for omitting it altogether. *Ibid.*

3. In an indictment under the Statute, Rev. Stat. ch. 34, sec. 48, for maiming by biting off an ear, it is not necessary to state whether it was the right or left ear. *State* v. *Greene*, 39

4. An indictment, which charges, that "A. B. and C. &c. with force and arms. &c. unlawfully, riotously, and routously did assemble together, to disturb the peace of the State, and did, then and there, being so assembled and gathered together, make a great noise and disturbance in and near the dwelling house of one W. S, proclaiming that the said W. S. and his wife were persons of color, offering them for sale at auction and calling them vulgar and opprobious names, all of which was done in a loud voice, so that the same could be heard at a great distance, to the great damage and terror of the said W. S. and wife and the common nuisance, &c." does not charge any criminal offence, inasmuch as it does not state that the said W. S. or his wife was in the house at the time. *State* v. *Hathcock*, 52

5. Every indictment is a compound of law and fact, and must be so drawn, that the Court can, upon its inspection, be able to perceive the alleged crime. *Ibid.*

6. The defendant was indicted and convicted upon the following indictment, to-wit:

"STATE of NORTH CAROLINA, } *Greene County.* } Superior Court of Law, Fall Term, 1846.

The jurors for the State upon their oath present, that John Patterson, late of the County of Greene, on the 1st day of August, 1845, and on divers other

days and times between that day and the day of the taking of this inquisition with force and arms, at and in the County aforesaid, did keep and maintain a certain common ill governed and disorderly house, and, in his said house, for his own lucre and gain, certain persons, as well free as slaves, to frequent and come together, then and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said persons in his said house at unlawful times, as well in the night as in the day, then and on the said other days and times there to be and remain, drinking, tippling, and misbehaving themselves unlawfully and wilfully did permit and doth permit to the great damage and com mon nuisance of all the citizens of the State there inhabiting, residing and passing, to the evil example of all others in like case appending, and against the peace and dignity of the State." Upon motion in arrest of judgment, *held* that this indictment did charge a criminal offence, and that it was not necessary to set out farther the particulars, as the names of the parties, &c., though these particulars might be given in evidence on the trial. *State* v. *Patterson*, 70

7. In an indictment for larceny, when the property stolen is alleged to be the property of A. B., and that the defendant "did feloniously steal, take and carry away the said property," this is a sufficient description of the offence. It is not necessary to state, that the property stolen was then actually in the possession of the said A. B. or that it was actually taken out of his possession, the law implying his possession from his ownership. *State* v. *Gallimore*, 147

8. An indictment for stealing a hog is well supported by shewing that the defendant stole a shoat. *State* v. *Godet*, 210

9. Where an indictment alleges the property stolen to be the property of *Elizabeth Moore*, and the evidence shews it was the property of a woman called Betsey Moore, it must be left to the jury to decide whether the person so described was known by both names. *Ibid.*

10. In such an indictment, the christian and surname of the party injured, if known, must be stated; and the name so stated must be either the real name or that by which he is usually known: either is sufficient. *Ibid.*

11. An indictment for high way robbery may charge either that the robbery was committed *in* the high-way or that it was committed *near* the high-way. *State* v. *Anthony*, 234

12. An indictment for high-way robbery, which charges that the property was taken from the person and against the will of the owner, feloniously and violently, is sufficient. *State* v. *Cowan*, 239

13. In an indictment for altering the mark of a cattle-beast, it is not necessary to set forth the original mark nor in what manner the alteration was made. *State* v. *O'Neal*, 251

14. An indictment for trading with a slave in the day time, by selling him spirituous liquor, must negative an *order* of the owner or manager, as well as a delivery for the owner. *State* v. *Miller*, 275

15. But an indictment for selling spirituous liquor to a slave in the night time, need not contain such a negation, for the offence is complete, whether the slave had a written permission from his owner or not. *Ibid.*

16. Upon conviction on an indictment containing several counts, one of which is good and the others bad, judgment must be rendered for the State upon the good count. *Ibid.*

INFANT.

Where an infant purchased land and gave his note for the purchase money, and, after he became of age, continued in possession of the land and promised to pay the note; *Held*, that this was a confirmation of the contract by the infant, after he became of age, and he and his representatives were bound by it. *Armfield* v. *Tate*, 258

JURISDICTION.

The State can bring an action in the Superior Court on a bond payable to herself for a sum less than one hundred dollars. *State* v. *Garland*, 48

JURORS.

1. In forming a jury in the trial of an indictment for murder, the prisoner challenged a person, tendered as a juror, because he was not indifferent for him. To sustain the challenge before the Court, the prisoner offered that person as a witness, and being sworn he stated "that he had formed and expressed an opinion adverse to the prisoner, upon rumors which he had heard; but that he had not heard a full statement of the case, and that his mind was not

so made up as to prevent the doing of impartial justice to the prisoner." *Held* that, upon this evidence, the Court might find that the juror was indifferent, and having so found as a matter of fact, the Supreme Court cannot revise their decision. *State* v. *Ellington*, 61

2. On the trial of an indictment against a slave for a capital offence, it is good cause of challenge on the part of the State to one called as a juror, that he is nearly related to the owner of the slave, as it would be on the part of the prisoner that a juror was a near relative of the prosecutor. *State* v. *Anthony*, 234

JUSTICES' JURISDICTION.

1. An account in the following words, to-wit:—

"Sold to Samuel G. Watson, this 6th of December, 1844, 153 Turkies at one dollar a pair, $76 50
211 chickens at 12 1-2 cents each, 26 38
$102 88
Payable in Corn at one dollar sixty cents, within sixty days, to deliver the Corn in
Credit this account fifty shillings, 5 00
$97 88

Signed,
J. G. Watson, Jr."

Is not a liquidated account within the meaning of our Act of Assembly, giving jurisdiction to a single justice, of liquidated accounts above sixty and under one hundred dollars. *Midgett* v. *Watson*. 143

2. A liquidated account, under this Act, means one in which the debt is adjusted and the balance stated, without the necessity of having recourse to extrinsic evidence. *Ibid.*

3. Where a judgment was rendered in October 1838 by a magistrate, upon a return of the constable on the warrant "executed," but not having the name of the constable signed to the return; *Held*, that this judgment was not *void*, for the want of the signature of the constable to the return on the warrant. *McElrath* v. *Butler*, 398

4. And, *held further*, that the defendant in that judgment, against whom a magistrate, at a subsequent time, had rendered judgment upon the former judgment, could not be relieved from the last judgment by writ of *recordari*, without first having the prior judgment reversed. *Ibid.*

5. A seal is not required to be affixed to an attachment or warrant issued

by a Justice in a civil case. *Parker* v. *Gilreath*, 400

LEGACIES AND DEVISES.

1. When a legacy is given to four children by name, and one of them dies in the lifetime of the testator, his legacy is lapsed and must go, as undisposed property, to the next of kin of the testator. *State* v. *Shannonhouse*, 9

2. A. had put into the possession of his daughter B. a negro woman named P. While in her possession, she had two children. A. then resumed the possession and continued it to his death, during which time P. had another child, A. afterwards died and among other things bequeathed as follows: "I give and bequeath to my daughter B. all the property I have heretofore possessed her with, except negro woman P. which I lend to her during her life, and after her death the negro woman P. and all her increase to be equally divided among my daughter B's. children." The executors assented to the legacy. *Held* that, after the death of B. her children could not recover by petition any of these negroes; *First*, because as to the negro woman P. the legal estate had vested in them and they might recover by action at law. *Secondly*, because as to the issue of P. born before the testator's death, they did not pass under the will to the children of B. *Hurdle* v. *Reddick*, 87

3. "Increase" in the bequest of a female slave means only the increase born after the testator's death; unless where upon an apparent intent to include issue born after the making of the will, or even that before, by any words of reference to a period, from which the birth of the issue, that is to pass, shall be counted. *Ibid.*

4. A testator devised to his wife during her life or widowhood all his estate except what he should by his will otherwise dispose of. He then gives certain property to his children to be theirs at *his* decease. Then comes this clause: "Also, at the decease of my wife, I give to my son G. my man Stephen, and to my son L. my man Charles. Also I give and bequeath to my son L. W. all my lands, &c." (on which he had previously given his wife a life estate.) "Also unto my son L. W. I give my two boys Dick and David with their mother." *Held*, that these negroes did not pass immediately to L. W. but only in remainder af-

ter the death or marriage of the widow. *Sherrill* v. *Echard*, 161

5. A testator devised "to my grandson J. S., son of S. S. the tract of land I now live on, with the reserve and privilege of my son S. S. the father of the said J. having the full privilege of the said land, and all the profits arising therefrom during his natural life." In a subsequent clause he says, "I further give and bequeath all my lands, that I am seized and possessed of at this time, or the profits arising therefrom to my beloved wife, during her natural life or widowhood, then for it to fall back to said heir as above mentioned." *Sullivan* v. *Ragsdale*, 194

6. *Held*, that, even if J. S. be the *heir* intended in the second clause of the will, yet he could only take the lands, subject to the reservation in the first clause of a life estate to his father, and that he could not bring an action to recover the lands in the lifetime of the father. *Ibid.*

7. A testator bequeathed to A. B. as follows: I give and bequeath unto my daughter Elizabeth Coon, during her natural life, at the end of which to the only heirs of her body, one negro girl named Riah, this to the aforementioned to them and their heirs forever." *Held*, that as this disposition, if applied to land, would have created an estate tail, it gives the absolute property in the slave to Elizabeth Coon, there being nothing in the other parts of the will to shew that the words, "heirs of the body," meant "children." *Coon* v. *Rice*, 217

8. A by will in 1786, devised to his son R a tract of land and then proceeded as follows: "And my desire is, if my son R die without heir lawfully begotten of his body, for it to be sold, and equally divided between his own sisters." *Held*, that the limitation over was too remote, and that estates tail having by the Act of 1784 been converted into fee simple estate, the son R took an absolute estate in fee simple in the land devised. *Hollowell* v. *Kornegay*, 261

## LIMITATIONS, STATUTE OF, AND PRESUMPTIONS.

1. If in reply, to the plea of an executor of the Act of 1789, limiting the time within which actions shall be brought against executors, &c. the plaintiff wishes to avail himself of the proviso in that Act, that he was requested by the executor not to sue, he

must state the fact in a special replication. *Hubbard* v. *Marsh*, 204

2. Where it appeared that payments were indorsed on the bond, declared upon, subsequently to the death of the testator, but it did not appear by whom, this afforded no evidence that the executor had requested delay. *Ibid.*

3. A surviving obligor cannot continue or revive the liability of the estate of a deceased obligor by partial payments, obtaining indulgence or other means, so as to repel the operation of that Statute. *Ibid.*

4. In an action on a bond for $60, payable to two attornies, for attending to a suit, which bond had been due more than twenty years, the defendants relied upon the presumption of payment or satisfaction under the statute, from the lapse of time. To rebut the presumption, the plaintiff proved, that one of the defendants had recently said that he had paid one-half of the bond, and the other half was relinquished, because the attorney to whom it was payable, had neglected to attend to the suit. *Held*, that these declarations were not sufficient to rebut the presumption. *Henry* v. *Smith*, 348

5. A payment made by one of the makers of a promissory note, within three years, will take the debt out of the statute of limitations as to all. *Davis* v. *Coleman*, 424

## MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, where probable cause is alleged, it is the duty of the Court to direct the jury, that, if they find certain facts from the evidence, or draw from them certain other inferences of fact, there is or is not probable cause; thus leaving the questions of fact to the jury, and keeping their effect, in point of reason, for the decision of the Court as a matter of law. *Beale* v. *Roberson*, 280

2. In an action for a malicious prosecution, it is sufficient, in order to prove the prosecution terminated, to shew that the plaintiff was bound to appear at a term of a Court to answer a criminal charge, that he did appear and was not rebound. Much more is it so, when the Solicitor for the State makes an entry on the docket, that he does not think the evidence sufficient to convict. *Rice* v. *Ponder*, 390

3. It is not a sufficient defence to an action for a malicious prosecution,

that the defendant really believed the plaintiff guilty of the crime, with which he charged him, but he must prove facts and circumstances, which would induce a reasonable suspicion of the guilt in the minds of unprejudiced and, at least, ordinarily intelligent persons. *Ibid.*

4. If the truth of the charges made in a libel, when the libeller has been prosecuted for it, will justify him in bringing an action for malicious prosecution, the charges ought to be proved to be strictly true by plain and full evidence. *Johnston* v. *Lance*, 448

MILLS.

1. An executor or administrator has a right to a remedy by petition, under the Act, Rev. Stat. ch. 74, to recover damages for the overflowing by a mill pond of his testator's or intestate's land in the lifetime of such testator or intestate. *Howcott* v. *Warren*, 20

2. A remedy by petition, under the Act of Assembly, Rev. Stat. ch. 74, to recover damages for overflowing land by a mill pond, may be had against the executors or administrators of the person who committed the injury. *Howcott* v. *Coffield.*

PARTITION.

1. The act of 1829 (*Rev. St. ch. 85, sec.* 18,) for the partition of slaves or other personal chattels applies only to a plain legal tenancy in common, and not at all to a suit against an executor for negroes, as parts of a legacy to two or more persons in common. *Amis* v. *Amis*, 219

2. In this latter case the rights of the claimants cannot be ascertained, until the administration has been closed, or all the accounts have been taken; and the executor is proceeded against in his character of a trustee for the legatees. *Ibid.*

3. The Court will not entertain suits for the separate parcels, which constitute the mass or residue of an estate; but, in order to avoid an unnecessary multitude of suits, requires that the suit should be so brought, as to take all the accounts and distribute the whole estate by the decrees that may be made therein. *Ibid.*

PARTNERS.

1. If one partner purchase goods, ostensibly for the firm, but in truth for himself, the firm is bound in the same manner as it would be, if the partner had borrowed money for the firm and misapplied it. *Dickson* v. *Alexander*, 4

2. Where two partners entered into a covenant that one of them should receive a salary for managing the business: *Held*, that this salary must be paid out of the partnership funds. *Weaver* v. *Upton*, 458

PAYMENT.

To make specific articles payments, they must be received as payments, or by subsequent agreement they must be applied as payments. *Locke* v. *Andres*, 159

PRACTICE AND PLEADING.

1. The Act of Assembly restraining Judges from expressing to the jury an opinion as to the "facts," of the case, only applies to those "facts," respecting which the parties take issue or dispute, and on which as having occurred or not occurred, the imputed liability of the defendant depends. *State* v. *Angel*, 27

2. When the Attorney General, upon an appeal by the defendant on an indictment, informs the Court, that he has looked into the record and that he consents that the *venire de novo* prayed for should be granted, the Court will of course grant the *venire de novo*, without examining into the errors assigned. *State* v. *Valentine*, 141

3. The Supreme Court will take no notice of mistakes by the jury in the Court below, whether or not they find against the facts or the law. *State* v. *Gallimore*, 147

4. The jurisdiction of the Supreme Court is confined to matters of law, adjudged by the Judge of the Court below, and, to ascertain what matters of law were so adjudged, they look to the case stated, which is in the nature of a bill of exceptions. *Ibid.*

5. Yet upon a motion in arrest of judgment, the Supreme Court will look into the whole record, and, if they find error, will so decide. *Ibid.*

6. In an action of debt upon a bond, where the defendant has pleaded several pleas, and among others the plea of *non est factum*, and the jury find all the pleas in favor of the defendant, this Court is concluded by that verdict and cannot inquire into the instructions of the Court below, as to the other pleas, whether those instructions were erroneous or not. *Doub* v. *Houser*, 167

7. Where the plaintiff, at the commencement of a suit, has given surety for its prosecution, it is not

competent afterwards for the Court, on his petition, to allow him to prosecute in *forma pauperis*, though the defendant objected to the surety and obtained a rule that further surety should be given or the suit should be dismissed. *Holder* v. *Jones*, 191

8. The Court ought either to have dismissed the suit, according to the rule, or to have made an order on the plaintiff's petition, permitting him to carry on his action, without giving further security. *Ibid.*

9. The Court could not discharge the first sureties from their responsibilities, without the consent of the defendant. *Ibid.*

10. A plea, that the amount claimed by the plaintiff together with the costs then due, had been tendered to him since the commencement of the suit, is, as a plea, no bar to the plaintiff's action, though the money has been paid into Court under that plea. *Murray* v. *Windley*, 201

11. The proper course, when no tender has been made before action brought, is for the defendant to move the Court that he may be permitted to pay into Court the amount he admits to be due. If the plaintiff agrees to receive this amount in full of his claim, the suit is at an end and the defendant pays the costs. If the plaintiff prefers going on to trial, and he does not recover more than the amount so admitted, he is liable for the costs incurred subsequently to the payment into Court. *Ibid.*

12. A special verdict is in itself a verdict of guilty, as the facts found in it do or do not constitute in law the offence charged. There is nothing to do on it but to enter a judgment thereon for or against the accused, unless the Court should deem the verdict, as found, not to be sustained by the evidence, when they may set it aside and order a *venire de novo*. *State* v. *Moore*, 228

13. A judgment on a special verdict leaves the matter of law distinctly open to review in a higher Court. *Ibid.*

14. But when the Court sets aside a special verdict, as they may do, they cannot of themselves enter a general verdict of guilty or not guilty. That must be done by a new jury. *Ibid.*

15. If done by the Court, it is a mistrial. *Ibid.*

16. A defendant, in his exception, must shew some error to his prejudice; otherwise this Court will not set aside the verdict of the jury. *State* v. *Cowan*, 239

17. There is no obligation on a Judge to interrupt

counsel in stating their conclusions, either of law or fact. It is the right and the duty of the presiding Judge, if counsel state facts as proved, upon which no evidence has been given, to correct the mistake, and he may do it at the moment, or wait till he charges the jury—perhaps the most appropriate time. *State* v. *O'Neal*, 251

18. An omission on the part of a Judge to instruct the jury on a particular point, if no instruction be asked from him on that point, is not error. *Ibid.*

19. The plea of not guilty to an action of trespass on the person, merely denies that he committed any trespass at all. *Meeds* v. *Carver*, 273

20. If, in such an action, the defendant hath matter of justification, he cannot give it in evidence under the general issue, but must plead it specially. *Ibid.*

21. The County Court has no power to reverse a judgment, rendered at a preceding term. *Ramsour* v. *Raper*, 346

22. Where a Judge told the jury in his charge, that they must find for one of the parties, unless they believed his witness had committed perjury, the charge was erroneous, because the credit of the witness was a matter for the jury, not for the Court, and the witness might have been mistaken, and not guilty of perjury. *State* v. *Thomas*, 381

23. This Court cannot act upon affidavits offered in the Court below. It is the province of that Court exclusively to determine the facts, and the Supreme Court can only review so much of the judgment, as involves matters of law, strictly. *Rhinehardt* v. *Potts*, 403

24. A defendant, who is sued upon a judgment, obtained before a Justice of the Peace, has no right to plead that he was an infant, when that judgment was rendered. *Ludwick* v. *Fair*, 422

25. A judgment by a Justice of the Peace, though not a matter of record, determines, between the parties, their respective rights in the matter of controversy. Neither party can, in a subsequent proceeding to inforce it, deny or contest the matters of fact, ascertained by it. *Ibid.*

26. Where a warrant is issued against three, and returned "executed," and the judgment is against the "defendant" in the singular, and so also is the entry in the stay of execution, and especially where the Justice, who rendered the

judgment, was himself a party defendant, it cannot be determined by the Court against whom the judgment really was. *Thomas* v. *Holcombe*, 445

PROCESSIONING.

1. A report of a processioner is radically defective, which does not state, with precision, the claims of the respective parties, so as to shew what lines were disputed or how far they were disputed. *Hoyle* v. *Wilson*, 466
2. The important and conclusive effect given by the statute in relation to processioning, whereby two inquisitions of the processioner vest an absolute title, requires the Court to view the proceedings with a vigilant eye, that no injury may accrue from tolerating an undue laxity in the proceedings. *Ibid.*

RECORDARI.

1. When a *recordari*, according to the common practice in our State, is brought with a view to have a new trial upon the facts, as it is a favor, in the nature of an extension of the power of appeal, it must be applied for speedily, and any delay, after the earliest period in the party's power to apply, must be accounted for. *Webb* v. *Durham*, 130
2. But when the *recordari* is used as the foundation for reviewing summary convictions, or other proceedings, before inferior tribunals in a case of false judgment, it is in the nature of a writ of error, and in fact always lies as a matter of right. *Ibid.*
3. Where the *recordari* is to bring up the proceedings in a case of forcible entry and detainer, although the plaintiff may have entered no traverse before the Justice, yet he shall be permitted to assign as many errors as he thinks proper. *Ibid.*

REGISTRATION.

Where the purchaser of a slave has two different places of residence in two different counties, the registration of his deed in either of those counties is sufficient. *Carter* v. *Spencer*, 14

RELIGIOUS SOCIETIES.

1. Where a conveyance is made to A. B. and C. for a certain tract of land, as trustees for the Methodist Episcopal Church, a suit of trespass *quare clausum fregit* may be brought by A. B. and C. against the wrongdoers, though they may not have been appointed trustees according to our Act of Assembly in relation to the appointment of trustees by

religious congregations. *Walker* v. *Fawcett*, 44

2. The title is vested in them individually and they may recover at law, though in the writ and declaration they style themselves "trustees." The latter word may be rejected as surplusage. *Ibid.*

3. It is only when a suit is brought by persons, who claims as "successors," that the question arises, whether the original bargainees were duly chosen the trustees of a religious congregation, and whether the persons suing were also duly chosen trustees, so as to give them legally the character of "successors" to the former, and thereby vest in them the title to the property which is necessary to support an action. *Ibid.*

ROADS.

See HIGHWAYS.

SEDUCTION.

An action by a father for the seduction of his daughter will not lie, when the daughter is of full age, and not living in her father's family, but in the actual employment of another person, though her father was to receive part of her wages. *McDaniel* v. *Edwards*, 408

SET OFF.

1. The plaintiff commenced his action of assumpsit on the 3rd of July, 1846. On the 13th when the Court, to which the action was returnable sat, the defendant pleaded as set-offs certain bonds of the plaintiff's due the 3rd of July. On these bonds the defendant had sued out warrants against the plaintiff on the 7th of July and recovered judgments on the 10th of July 1846. *Held*, that these bonds could not be introduced as set-offs, because they were merged in judgments before the plea pleaded. *Mizell* v. *Moore*, 255

2. A set-off must not only be due at the commencement of the suit, but must continue to be due in the same form, when pleaded. *Ibid.*

3. A. had collected a sum of money for B and, being sued for it by B's administrator, pleaded only the general issue. *Held*, that A. could not give in evidence, that B. had lived with him and that the expenses of her maintenance amounted to more than the money collected. He should have pleaded this as a set-off. *Donaho* v. *Witherspoon*, 351

SHERIFF.

1. A sheriff is bound to mark on process delivered to

him the *true* day on which it came to his hands—otherwise he will forfeit the penalty of $100 imposed by an Act of Assembly, *Rev. Stat. ch.* 31, *sec.* 43. *Hathaway* v. *Freeman*, 109

2. A sheriff, to whom a writ has been delivered, but who goes out of office before the return day of the writ has no power to make the return on it, and therefore is not liable to a mercement for not doing so. *State* v. *Woodside*, 296
3. It is the duty of the sheriff, going out of office, to deliver all the process remaining in his hands, to his successor. *Ibid.*
4. A judgment of an amercement against a sheriff is not conclusive against the sureties on his bond. They may show that the judgment was either fraudulently or improperly obtained against their principal. *Ibid.*
5. When a sheriff returns, that a writ came to his hands "too late to execute," the writ having been delivered to him more than ten, but less than twenty days before the term of the Court, he is liable to the penalty of five hundred dollars, prescribed by the Statute, *Rev. Stat. ch.* 109, *sec.* 18, for making a false return. *Lemitt* v. *Freeman*, 317
6. The plaintiffs sued out a writ against James Bowles, which was returned "*non est inventus;*" the plaintiffs in their joint names may sustain an action for a false return, as informers or as the parties grieved. *Houser* v. *Hampton*, 333
7. The ignorance of a sheriff's deputy, who makes a false return, if in fact it was false, does not excuse the sheriff from the penalty. *Ibid.*
8. When a defendant in a writ is openly and at large in a County, *non est inventus* is a false return; and, if he cannot be taken elsewhere, the statute requires, that the sheriff shall go to his place of residence, before he makes that return. *Ibid.*
9. If a sheriff, who has *mesne* process in his hands, finds the defendant and really endeavors to arrest him, and is prevented by any sufficient cause, or if, after arrest, the defendant is rescued, he should return the facts in excuse for not taking the body, and not return generally *non est inventus*, contrary to the fact. *Ibid.*
10. Rescue is a good return in excuse, and the sheriff may return, that he did not take the body, because he was kept off by force of arms. *Ibid.*
11. The sheriff is not obliged to summon the power of

the County upon *mesne* process. *Ibid.*

12. What is an excuse to the sheriff for not making an arrest is matter of law, after the facts are ascertained. *Ibid.*

13. Where a sheriff's bond had been taken in 1838, only three justices of the County Court being present, and the bond was only for $4,000 instead of $10,000 as required by law; *Held*, that these defects were cured by the Act of 1844-5, which had a retrospective, as well as a prospective, operation. *State* v. *Jones*, 359

14. A sheriff and his sureties in his official bond are not bound for the collection of any claim put in his hands for collection, unless, as in the case of constables, the claim be within the jurisdiction of a Justice of the Peace. *State* v. *Long*, 379

See EVIDENCE—EXECUTION.

## SLANDER.

1. Where, in speaking of a trial before a magistrate, in which the plaintiff had been a witness, the defendant said that "he (the plaintiff) had sworn falsely," these words import that the plaintiff had committed perjury and are, in themselves, actionable. *Rhinehardt* v. *Potts*, 403

2. Where one repeats an oral slander and gives the name of his informant, he is justified or not, according to the *quo animo* the charge is repeated and propagated. *Johnston* v. *Lance*, 446

3. In the case of a written libel, the mention of the name of the author, or the general rumor, of the libellous matter, will not excuse or justify the publication of such, even if the author or the rumor be distinctly proved. *Ibid.*

4. Where a person charges another with perjury and is sued in an action for the defamation, it is not sufficient for him to prove simply, that what the plaintiff swore to was not true, but he must introduce evidence to convince the jury that the false oath was taken corruptly. *Chandler* v. *Robison*, 480

## STATUTES.

General statutes do not bind the sovereign, unless expressly mentioned in them. *State* v. *Garland*, 48

## TAXES.

1. Where in an action against the sheriff and his sureties for failing to collect the County Taxes, it appeared from the record, that "twenty-two Justices" were on the bench,

when the taxes were assessed; *Held*, that the Court must intend that these were a majority or the whole of the Justices of the County, and therefore the taxes were properly imposed. *State* v. *McIntosh*, 68

2. This is different from the cases, in which the law requires a *certain number* of Justices to be present, when a tax is imposed, and the record does not shew that the requisite number was present. *Ibid.*

TENANTS IN COMMON.

1. When one of two tenants in common of a tract of land is in possession of the tract, and his co-tenant makes a demand of the whole tract, his refusal to comply with that demand is not to be considered as evidence of an ouster of his co-tenant. *Meredith* v. *Andres*. 5

2. More especially is this the case when the demand is made by one professing to claim under the co-tenant, but of whose title the tenant in possession knows nothing. *Ibid.*

3. Nor, when the person so claiming enters into possession and is turned out by a writ of forcible entry and detainer, can this be considered an ouster of the co tenant. *Ibid.*

TENANT AT WILL.

The estate of a tenant at will is determined by a demand of possession by the owner, and also by his own conveyance in fee. *Howell* v. *Howell*, 496

TOWNS.

1. The commissioners of an incorporated town have no right to impose any taxes, but such as are expressly authorized by the Act of incorporation. *Comms. of Asheville* v. *Means*, 406

2. A power to enact bye-laws, &c. for the good government of the town, of *itself*, confers no right to levy taxes. *Ibid.*

TRESPASS.

1. Where land is subject to entry and has been granted, the action of Trespass Q. C. F. lies, although the land is covered with water. *Smith* v. *Ingram*, 175

2. One, who is in the actual or constructive possession of land, may recover damages from him, who dispossesses him, tho' not in possession at the time of the action brought. No ulterior profits or damages can be recovered, until he regains the possession; and then the law, by relation, would adjudge him to have been in possession from the first ouster, and

entitle him to damages for all the time the defendants wrongfully held the lands. *Ibid.*

3. In order to entitle one to maintain trespass *quare clausum fregit*, where he has no occupation of any part of the premises, he must shew a title in himself from which the law can deduce, that constructively, he has the possession. *Cohoon* v. *Simmons*, 188

4. The plea of *liberum tenementum* in an action of trespass, q. c. f. admits the fact, that the plaintiff was in possession of the *close* described in the declaration, and that the defendant did the acts complained of, raising only the question whether the *close* mentioned was the defendant's freehold or not. *Gilchrist* v. *McLaughlin*, 310

5. A plaintiff may recover damages for a wrongful entry upon his land by a disseisor, although he may not have regained possession of his land at the time of the action brought. *Ibid.*

6. Where a tenant claims by a disseisin, ripened into a good title by lapse of time, he must shew an actual, open and exclusive possession and use of the land as his own, *adversely* to the title of the demandant. It must be known to the adverse claimant or be accompanied by circumstances of notoriety. *Ibid.*

7. Where a person intends to place his fence on a particular line, but accidentally places a small part of it on land claimed by another, this will not be a possession adverse to such claimant. *Ibid.*

See DAMAGES.

TROVER.

Where the defendant, in consideration of a debt he owed, agreed to let the plaintiff have a bed and furniture of the value of $28, but no particular bed and furniture were conveyed or delivered, and afterwards the defendant refused to deliver any bed and furniture; *Held*, that the action of trover would not lie for the plaintiff. *Jones* v. *Morris*, 370

TRUSTS.

See EXECUTIONS.

USE AND OCCUPATION.

1. In an action for use and occupation, where it appeared that one P. had leased the premises to the defendant for the year 1844, that in the latter part of that year he, with the knowledge and consent of

the defendant, rented the same to the plaintiff for the year 1845, who leased a part of the same premises to the defendant, who occupied them and held them under the plaintiff. *Held* that, if this was a case, in which attornment was necessary, the defendant had attorned, and at all events was liable to the plaintiff for the rent. *Cooke* v. *Norris*, 213

*Held*, further, that the defendant having abandoned the premises before the end of the year 1845, and no specific contract being proved as to the time he should enjoy them and the premises being a wharf and ware-house in a commercial town, it was properly left to the jury to say for what time the parties intended the lease to continue, and the Court could not non-suit the plaintiff, because his action was brought before the expiration of the year. *Ibid.*

USURY.

1. Where an usurious loan is made to A as the avowed agent and for the benefit of B, the declaration must state the loan to have been made to B. *Jones* v. *Herndon*, 79
2. Though in a declaration for usury it is proper that some day should be stated as the day of payment of the usurious interest, yet it is not necessary to set forth the true day of payment, inasmuch as it is immaterial when the usurious interest was paid, if before the commencement of the action. *Ibid.*
3. It is only necessary to set forth truly the time for which the forbearance was stipulated in the contract of loan. *Ibid.*
4. When a person loaned $800 at a premium of $80 beyond the lawful interest, and afterwards took the defendant's bond for $932 80 being the principal and interest on the $800 loaned and the premium of $80—and he also gave a separate note for $93—and the declaration in a *qui. tam.* action alleged that this 93 was for the usurious interest on a loan of $932 50 cents. *Held*, that the evidence did not correspond with the declaration, as the usurious interest reserved was for the loan of $800. *Pipkin* v. *Bond*, 118
5. Where the contract for the loan of money is made in Georgia, it will bear Georgia interest, though the note for the amount loaned be executed in this State. *Davis* v. *Coleman*, 424

VENDOR AND VENDEE.

1. The circumstance, that the vendor was informed,

before the completion of the contract, that the vendee intended the place as a residence for his kept mistress, does not vitiate the contract. *Armfield* v. *Tate*, 258

2. The law annexes no condition that the title-deeds shall be given, before a suit can be commenced on a note given for the purchase money. *Ibid.*

WARRANTY.

An implied warranty cannot extend to defects, which are visible and alike within the knowledge of the vendee and the vendor, or when the sources of information are alike open and accessible to each party. *Hudgins* v. *Perry*, 102

WIDOW.

Where a testator dies, having made no provision by his will for his wife, and that wife is a lunatic under the care of a committee, she cannot claim by petition any portion of the testator's estate, because she is incapable from want of reason, of dissenting herself, and her committee has no authority by law to enter a dissent in her behalf. *Lewis* v. *Lewis*, 72